

# A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory

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*Gay legal theory is at a crossroads reminiscent of the sameness/difference debate in feminist circles and the integrationist debate in critical race theory. Formal equality theorists take the heterosexual model as the norm and then seek to show that gays, lesbians, bisexuals, and transsexuals—except for their choice of partners—are just like heterosexuals. Antisubordination theorists attack the heterosexual model itself and try to demonstrate that a society that insists on such a model is unjust. Neither of these strategies is wholly satisfactory. The formal equality model will fail to bring about fundamental reforms as long as sexual minorities are perceived as different from straights, while the outsider model feeds perceptions of difference.*

*In A Different Kind of Sameness, Professor Nancy Levit explores the development of tolerance for sexual minorities, looking at both cultural signifiers and law. The grudging acceptance that is developing, both culturally and legally, is one of the hallmarks of the formation of an underclass group. The Article suggests that the challenges for gay legal theory are twofold: to move away from the frailties of both formal equality and antisubordination theories, and to develop ways of representing sexual minorities that will make them more acceptable, if not valuable, in a broader cultural context.*

*Professor Levit proposes changing the rhetoric and doctrine of equality theory by developing a theory of respect for the common humanity of all people. Unlike antisubordination theory, shared humanity seeks assimilation into the dominant culture, while still resisting many of the culture's traditional institutions and interpretations. Unlike formal equality, a theory of shared humanity does not rest on the heterosexual norm. Instead, it draws on knowledge in anthropology, sociology, philosophy and psychology in the search for those qualities, characteristics, needs, and desires that make us—all of us—the same as people.*

## I. INTRODUCTION

Our culture treats sexual orientation as a matter of “idiosyncratic personal . . . taste”<sup>1</sup> rather than as a determinant of family, equality, power and

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<sup>1</sup> Jean L. Cohen, *Is There a Duty of Privacy? Law, Sexual Orientation, and the*

group belonging. A recent New Republic article by Lee Siegel criticized queer theory for “the sexualization of everything.”<sup>2</sup> “Queers,” Siegel charges—and he doesn’t use the term affectionately—“are engaged in a vast theoretical project of breaking up fixed sexual identities into the fluidity of sexual acts or practices. Instead of whom you have sex with, queer theory is interested in how you obtain sexual pleasure. Queer denotes ‘genitality,’ masturbation, and ‘fisting,’; cross-dressing, transvestism, and sadomasochism.”<sup>3</sup>

The popular construction of lesbian, gay, bisexual, and transgendered individuals as deviant has fostered novel forms of homophobia. These new forms of hatred, fear, and misunderstanding have inspired antigay rhetoric such as that of Senator Trent Lott, who compared homosexuality to alcoholism, “sex addiction,” and kleptomania.<sup>4</sup> The religious right has weighed in recently with the “ex-gay” religious movement promoting the conversion of sexual others to heterosexuality by sponsoring a “homosexuals can be cured” ad campaign.<sup>5</sup>

In short, the cultural representations of gay and lesbian identity and relationships are reduced to sexual behavior—fisting and fucking. The dominant cultural construction of gay and lesbian relationships presents an image of sex acts rather than one of relationships. The portraits of lesbians, gays, bisexuals, and transgendered individuals (“sexual others” or “sexual outsiders”) are of people not quite fully human, deviant, and deficient morally.

This Article explores the relations between cultural re-presentations of sexual others and legal theory about sexual outsiders (“gay legal theory”). It suggests that gay legal theory faces difficulties in the development of a coherent strategy for garnering rights and respect. Those difficulties center on an uneasy tension among theorists, some of whom remain committed to a model that pursues formal equality under heterosexual norms, others of whom adopt an outsider strategy that challenges heteronormativity. This choice of models for legal theory and litigation strategies has significant implications for the cultural presentation of sexual minorities. The formal equality model will fail to transform the status of sexual others as long as they are perceived as “different” from straights, while the outsider or antistatutory model tends to feed

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*Construction of Identity*, 6 TEX. J. WOMEN & L. 47, 57 (1996).

<sup>2</sup> Lee Siegel, *The Gay Science*, NEW REPUBLIC, Nov. 9, 1998, at 30.

<sup>3</sup> *Id.* at 32.

<sup>4</sup> Alison Mitchell, *Controversy Over Lott's Views of Homosexuals*, N.Y. TIMES, June 17, 1998, at 24.

<sup>5</sup> Doug Ireland, *Gay Ed for Kids*, NATION, June 14, 1999, at 8. Both the American Psychiatric Association and the American Psychological Association have rejected Christian “reparative” therapy as unfounded, saying it could cause “depression, anxiety, and self-destructive behavior.” Woody Baird, *90s Crusade to ‘Convert’ Gays*, CHI. TRIB., Apr. 16, 1999, § 2, at 8.

perceptions of difference.

In Part II, this Article examines the development of tolerance for lesbians, gays, bisexuals, and transgendered people, looking at both cultural signifiers and law. It is a particular sort of tolerance that is developing, repressive tolerance—a grudging acceptance that is one of the hallmarks of the enduring formation of other underclass groups. Once the social designation is made that a group violates behavioral norms, the expectation is that the group should change rather than that the law should eliminate any structural inequalities.<sup>6</sup> Negative cultural representations shape governmental unwillingness to protect sexual minorities from discrimination, but the influence runs in both directions. Law also has instrumental effects on cultural representation: when law silences these facets of identity, this gives permission for cultural silencing.

Part III explores two ideological tensions that occur against this backdrop of intolerance, one within gay legal theory, and the other between gay legal theory and judicial practice. The first tension among gay legal theorists is whether the objective should be to develop an ideal model that implicitly judges some relationships as more worthy than others, or an outsider strategy that seeks to destabilize the existing view of sexual others without offering a replacement.

While many, if not most, of the practical successes for sexual others have emanated from the formal equality model,<sup>7</sup> the model is fraught with difficulties. Equality theory demands line-drawing, which in the case of the rights of sexual minorities, may mean embracing an ideal model and using it to draw lines to distinguish among sexual others. Since the ideal model for formal equality theory has been based on heterosexual norms, this means the lines have been drawn between committed partnerships and multiple relationships, between flamboyant queens and straight-acting suburban couples, between gays or lesbians and other gender hybrids.

A second flaw of the formal equality model is tied to the reliance on heterosexual norms. If respect for gay and lesbian relationships comes only from their resemblance to categories of straight relationships, how can laws transform consciousness? This idealized model has as its reference point traditional gender norms (and biases), and it makes abnormal any relationships other than heterosexual ones. In looking for sameness, do we risk continued subordination?<sup>8</sup>

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<sup>6</sup> See John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1951 (1999).

<sup>7</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Able v. United States*, 968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>8</sup> See Susan P. Sturm, *Sameness and Subordination: The Dangers of a Universal*

The second ideological tension is the practical incarnation of the first: the prevailing theoretical model is not the model that seems to influence courts. Most discussion in the academy favors a framework that seeks to provide support for outsider groups.<sup>9</sup> The ideas that motivate courts, however, seem to be structured around an equal rights framework based on individualism.<sup>10</sup>

The strategic challenge for lesbian, gay, bisexual, and transgendered groups is dramatic: while advances can be gained by developing legal strategies that use an individual rights model, the successes may be partial and ultimately dangerous. Any victories based on a rights model may use the civil rights precedents of other disempowered groups in ways that contribute to the limitation rather than expansion of civil rights more generally.

In Part IV, this Article will address the prospects for moving beyond formal equality and outsider theories to change the rhetoric and doctrine of equality theory by developing a theory of respect for the common humanity of all people. This theory of shared humanity attempts to engage the tensions of assimilation and resistance—it seeks both acceptance of sexual others by the dominant culture and radical resistance to many of the culture's traditional institutions and interpretations. Shared humanity departs from formal equality, since it does not look at the ways sexual minorities are like heterosexuals, but instead looks for common features of personhood. Here I turn to literature in anthropology, sociology, philosophy, and psychology in the search for those qualities, characteristics, needs, and desires that makes us—all of us—the same as people.

Shared humanity recognizes the essentialist risks of any homogenizing strategy: a theory that looks for similarities among individuals apart from group belonging threatens to ambiguate the meaning of sexual identity. Thus the humanist theory advanced here requires respect for identity differences and careful attention to the process of cultural construction of differences, both of which necessitate the understandings that identities are fluid, knowledge is contextual, and truths can be a matter of perspective. The theory of shared humanity tries to distinguish between appropriate and inaccurate constructions of identity differences through the use of reason and empirical evidence from a variety of disciplines.

The Article concludes by returning to the question of cultural re-presentation of sexual others. It asks in what ways gay legal theory can represent sexual outsiders and their relations that will make them more acceptable, if not valuable, in a broader cultural context.

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*Solution*, 143 U. PA. L. REV. 201 (1994).

<sup>9</sup> See *infra* text accompanying notes 57–72.

<sup>10</sup> See *supra* note 7 and *infra* text accompanying notes 97–121, 278.

## II. SOCIAL AND LEGAL TOLERANCE FOR SEXUAL OTHERS

### A. *Is Cultural Acceptance Increasing?*

In the late 1990s, both popular essayists and legal academics have debated whether social and legal tolerance for lesbians, gays, bisexuals, and transgendered people is increasing or decreasing.<sup>11</sup> Perhaps coming out now is easier in many contexts than at any time in recent history.<sup>12</sup> Most straights now know someone who is gay, and they know that they know. A decade ago, the words "gay" and "lesbian" were taboo in the media.<sup>13</sup> In that same time frame, newspapers have been convinced to reverse their policies about listing same-sex surviving partners in obituaries. Independent gay presses are cornering a larger share of the market, while gays and lesbians populate an increasing number of mainstream fiction and nonfiction books.<sup>14</sup>

National political action organizations and support groups have promoted political, legal, and social acceptance of sexual others. The Gay and Lesbian Alliance Against Defamation (GLAAD), formed in 1985, fights for fair and

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<sup>11</sup> See, e.g., Robert D. Davila, *Organization Helps Families Understand Homosexuality*, SACRAMENTO BEE, Apr. 18, 1999, at B1 (quoting national PFLAG President Paul Beeman, "We've seen remarkable growth in the number of parents who are eager to share unconditional love for their gay and lesbian kids."); Carey Goldberg, *Acceptance of Gays Up, But Most Still Disapprove, Study Says*, FORT WORTH STAR TELEGRAM, May 31, 1998, at A15 ("U.S. acceptance of gay men and lesbians has grown significantly in recent years, as has support for their civil rights, but a majority of the population still disapproves of homosexuals, according to a study by the National Gay and Lesbian Task Force . . . . Gay men and lesbians remain two of the least-liked groups in the country, the survey found."). But see Mary Louis Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1, 3-4 (1998) (remarking on both "greater societal tolerance" for sexual minorities and "increased hostility"); Jonathan Ng, *The Invisible Honest Teen*, KAN. CITY STAR, Nov. 27, 1998, at F10 (reporting on a recent survey of 3,000 students done for Who's Who Among American High School Students, showing a "decrease in tolerance for people of other races and homosexuals").

<sup>12</sup> See Hilary E. Ware, Note, *Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for "Outed" Celebrities*, 32 HARV. C.R.-C.L. L. REV. 449, 455 (1997) ("studies show that the single most relevant factor in determining the attitude an individual has towards gay men and lesbians is whether or not she knows someone gay"); Joseph P. Shapiro et al., *Straight Talk About Gays*, U.S. NEWS & WORLD REP., July 5, 1993, at 42, 46 (between 1985 and 1993, the percentage of Americans who "personally know someone" who is gay increased from 25% to 30% to 53%).

<sup>13</sup> *A Brief Introduction to GLAAD* (visited Apr. 24, 2000) <<http://www.glaad.org/glaad/history.html>>.

<sup>14</sup> See David Sexton, *Can Literature Really Be Gay?*, DAILY TELEGRAPH (London), July 31, 1991, at 10; *Two Political Figures Extend the Boundaries of Gay Literature*, CHI. TRIB., Aug. 25, 1996, at 5.

accurate media representations based on sexual orientation. Parents, Families, and Friends of Lesbians and Gays (PFLAG), a nonprofit support group formed in 1981, has grown to more than 75,000 members in countries around the world.<sup>15</sup>

Other markers of greater social acceptance include increased visibility in news and pop culture images. From "Silkwood" to India's first lesbian film, "Fire," we see some less-clichéd, less one-dimensional portraits. There has been a movement from the ice-pick lesbians in "Basic Instinct" to friendly, accessible, girl-next-door lesbians, like "Ellen." An increasing number of cities sponsor gay pride parades.<sup>16</sup> The very idea that homosexuality exists is seeping into the culture, and some of the cultural images are changing.

### B. Tolerance "Lite" and Deepening Hostility

In some ways, though, the representation of gay and lesbian lives on the eve of a new millenium is little more than a flat stereotype. Mainstream television has not gone very far—gays and lesbians are portrayed in nowhere near their numbers in the population.<sup>17</sup> Bisexuals and transgendered individuals are portrayed nowhere. In commercials, almost everyone is straight.<sup>18</sup> In some

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<sup>15</sup> See Davila, *supra* note 11, at B1.

<sup>16</sup> Compare Queer Resources Directory, *Queer Events: 1993* (visited Apr. 24, 2000) <<http://www.qrd/events/1993/pride.dates.93>> (listing 61 gay and lesbian pride celebrations in Canada, Europe, Africa, and the United States in 1993) with International Association of Lesbian/Gay Pride Coordinators, *Interpride Global Calendar 1998* (last modified June 17, 1998) <<http://www.qrd.org/qrd/orgs/IALGPC/interpride.global.calendar.update-06.18.98>> (listing 239 such celebrations around the world in 1998).

<sup>17</sup> Estimates on the incidence of homosexuality in the population vary. See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 650–51 (1948) (estimating that approximately 10% of males are gay); Christopher Hewitt, *Homosexual Demography: Implications for the Spread of AIDS*, 35 J. SEX RES. 390, 390 (1998) (citing a 1994 survey by the Yankelovich Monitor that guaranteed anonymity to participants in which "5.7% of the respondents described themselves as either gay, lesbian, or homosexual"); Joannie M. Schrof & Betsy Wagner, *Sex in America*, U.S. NEWS & WORLD REP., Oct. 17, 1994, at 74, 76 ("[J]ust 2.8 percent of men and 1.4 percent of women say they are gay. When the question is broader, 10.1 percent of men and 8.6 percent of women either identify themselves as gay, say they have had a sexual experience with someone of the same gender or claim to have some physical attraction to members of the same sex."). Even assuming the more conservative estimates of 3–5%, one of every twenty or thirty characters on television is not lesbian, gay, bisexual, or transgendered. See Martin Renzhofer, *Hollywood Has Its Mind on Sex for Fall Season*, SALT LAKE TRIB., July 23, 1999, at F11 (noting that the four major networks plan to "unveil 17 gay characters" for fall programming and remarking in a curiously optimistic tone that "Hollywood has come out of the closet," since this is "about the same number as black, Asian and Latino characters combined."").

<sup>18</sup> Some companies are producing ads showing same-sex couples, but run them only in

spheres, sexual minorities are still depicted as dangerous predators, killers, and psychopaths,<sup>19</sup> or as flat stereotypes.<sup>20</sup> Once the wholesome girl-next-door emerges from the closet, her show is promptly cancelled.<sup>21</sup> The evolution in the depiction of gays and lesbians on screen is a movement from the pre-1980s consensus that "gay is evil"<sup>22</sup> to an idea that gay people are potentially acceptable, as long as no attention is given to their lifestyles, relationships, or sexuality.<sup>23</sup>

The social acceptance of lesbians, gays, bisexuals, and transsexuals seems to have reached some invisible limit, and there has been retrenchment. A number of colleges have either refused to include sexual orientation among the categories of people protected under their antidiscrimination policies or have redacted the category.<sup>24</sup> In 1998, Maine became the first state to reverse its law that

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certain targeted media, such as gay magazines. Others are beginning to have ads that are at least ambiguous. See, e.g., Nan Alamilla Boyd, *Shopping for Rights: Gays, Lesbians, and Visibility Politics*, 75 DENV. U. L. REV. 1361, 1361 (1998) (describing an Anheuser-Busch commercial that positions the caption "SIGNIFICANT OTHER" over a bottle of Bud Light leaning against a can of Bud Light).

<sup>19</sup> If a psychopath happens to be gay, the intersection of those qualities commands excessive media attention. Look at the press given to five victim spree killer Andrew Cunanan. In the psycho-serial killer sweepstakes, he does not come close to Manson, Speck, Bundy, or Kaczynski, but he was gay and out and lived "the lifestyle." See Dan Savage, *Gays, Lesbians Can't Have Heroes (DeGeneres) Without Monsters (Cunanan)*, SEATTLE POST-INTELLIGENCER, July 27, 1997, at E3. Television announcer Tom Brokaw called Cunanan a "homicidal homosexual." Richard Goldstein, *On Cunanan*, VILLAGE VOICE, Jan. 6, 1998, at 30; see also WILD THINGS (Sony 1998); BOUND (Republic 1996); SILENCE OF THE LAMBS (Orion 1991); BASIC INSTINCT (Tri Star 1992); CRUISING (LORIMAR FILMS 1980). But see THE OBJECT OF MY AFFECTION (20th Century Fox 1998); IN AND OUT (Paramount 1998); MY BEST FRIEND'S WEDDING (Tri Star 1997); PHILADELPHIA (Tri Star 1993); LIANNA (United Artists Classics 1983); PERSONAL BEST (Geffen 1982). See generally VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES (1981).

<sup>20</sup> See, e.g., TO WONG FOO, THANKS FOR EVERYTHING, JULIE NEWMAR (Universal 1995); THE BIRDCAGE (United Artists 1995).

<sup>21</sup> Other shows, such as *Will and Grace*, are developing gay characters who are portrayed without sexuality as the primary facet of their identity. But of course *Will and Grace* also boasts the stereotypically flamboyant Jack. See *Will and Grace* (NBC television broadcast, 1998-pres.).

<sup>22</sup> Kevin Thomas, *De Mille's 'Road' Returns to Silent Era*, L.A. TIMES, Aug. 17, 1992, at F10 (referencing film historian Danny Mangin's film clips and lecture, "Psycho Killers and Twisted Sisters").

<sup>23</sup> *The Object of My Affection* and *My Best Friend's Wedding*, for instance, have major characters who are gay, but the movies are not about actually being gay. The gay people in these movies are largely a vehicle through which a straight character becomes a healthier heterosexual.

<sup>24</sup> Diane Carroll, *Gays Criticize Policy Revisions*, KAN. CITY STAR, Dec. 2, 1998, at B3

prohibited discrimination against gays in employment, housing, and public accommodations.<sup>25</sup> In a 1998 survey of teenagers featured in *Who's Who Among American High School Students*, 48% admitted "they are prejudiced against homosexuals," a rise of 19 percentage points from a similar survey the year before.<sup>26</sup> Conservative groups consistently mount strong opposition to gay awareness education in public schools.<sup>27</sup>

Antigay zealots increased their violence in late century. The pistol-whipping death of college student Matthew Shepard in Wyoming in October of 1998 drew attention to antigay violence for a time. The national media reported the array of antigay crimes as follows: graffiti, vandalism, offensive and intimidating language, and physical assaults.<sup>28</sup> But when four months later gay Alabama textile worker Billy Jack Gaither was beaten to death with an ax handle and his body sacrificially burned, the outcry was muted. In February of 1999, when openly gay 17-year-old Adam Colton founded a Gay-Straight Alliance at his high school in Marin County, California, and three teenage males beat him senseless and carved the word "fag" into his arms and stomach with a ball point pen, the brutality received little airplay outside of California.<sup>29</sup> It was simply not

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(reporting that Emporia State University withdrew sexual orientation from protected class status in its antidiscrimination policy); Chuck Colbert, *Notre Dame Blew It on Discrimination Policy*, 45 NAT'L CATH. REP. 19 (Mar. 26, 1999) (trustees of Notre Dame refused to add sexual orientation as a protected category under the school's nondiscrimination clause); see also Craig Garrett, *District Drops Gay Policy: Wayne-Westland Schools Delete 'Sexual Orientation' from Protected Category*, DETROIT NEWS, Aug. 20, 1997, at C1; Julie Irwin, *Court Lets Stand Law Denying Gay Protection*, CIN. ENQUIRER, Oct. 14, 1998, at A1; Kristina Johnson, *Human Rights Law Under Fire; Group to Gather Names for Initiative to Remove 'Sexual Orientation'*, SPOKESMAN-REV. (Spokane, Wash.), Mar. 16, 1999, at A1.

<sup>25</sup> See Carey Goldberg, *Maine Voters Repeal a Law on Gay Rights*, N.Y. TIMES, Feb. 12, 1998, at A1.

<sup>26</sup> Tanika White, *Who's Who Poll Sees Rise in Student Cheating, Bias*, KAN. CITY STAR, Nov. 13, 1998, at A1. The temperature has not changed much since 1992. See Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1068 (1994) (describing University of Michigan study in which more than 50% of those surveyed said they felt coldly toward gay men and lesbians).

<sup>27</sup> See Janita Poe, *Tension in Classrooms Brings Gay Issues to Fore*, CHI. TRIB., Oct. 19, 1998, § 1, at 1.

<sup>28</sup> Lisa Gelhaus, *Gay-Bashing Victims Overcome Prejudice to Win Civil Settlements*, TRIAL, Feb. 1999, at 14.

<sup>29</sup> See Ireland, *supra* note 5, at 8; Marisa Samuelson, *Support Groups Allow Gay Teens to Express Fears*, TUCSON CITIZEN, Mar. 27, 1999, at 1A. This triptych of late 1990s antigay violence omits the celebrated cases occurring earlier in the decade, such as the story of Brandon Teena, a 21-year-old anatomical female who lived as a male and dated women in a rural Nebraska town. Two weeks after town residents discovered his biological sex, two men



news that a member of an unpopular group was targeted for violence. A recent Pennsylvania State University study revealed that "80 percent of gay youths reported having been physically abused, 44 percent faced physical threats, and 17 percent were physically harmed."<sup>30</sup> The sad truth is that gay-bashing is not unusual.

### C. *The Legal Landscape of "Tolerance"*

Perhaps in the larger sweep, over time and globally, legal and cultural tolerance of gays and lesbians is increasing. But it is a particular kind of tolerance: not the tolerance of undogmatic, objective acceptance, but of grudging endurance. It is repressive tolerance. As my friend Sam Marcosson says, it is a "hold your nose" and tolerate form of acceptance.<sup>31</sup> This leaves sexual others living in a twilight of "virtual equality," villified, shunned, alienated, closeted, marginalized—far from truly liberated, accepted, or treated as fully equal.<sup>32</sup>

Consider the legal dimensions of tolerance. Until 1961, all fifty states criminalized sodomy; only eighteen do today.<sup>33</sup> But in the past two decades, a handful of states have amended their antisodomy statutes to cover only activity between same sex partners.<sup>34</sup>

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raped and murdered him. See Rogers Worthington, *Deadly Deception: Teena Brandon's Double Life May Have Led to a Triple Murder*, CHI. TRIB., Jan. 17, 1994, § 5, at 1.

<sup>30</sup> *Gay High-Schooler Boosts Tolerance*, RICH. TIMES-DISPATCH, Jan. 19, 1999, at B4.

<sup>31</sup> See Telephone interview with Sam Marcosson (Spring, 1999). See generally Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19 (1998). For a recent example of the point, see Richard Brookhiser, *The Gay Moment*, NAT'L REV., July 26, 1999, at 42, 43 (cover story proclaiming "They're here. They're queer. We're used to it." against caricatured cover art featuring Jar Jar Binks, Tinky Winky, Abraham Lincoln, Ellen Degeneres, and Oscar Wilde, with text that buys into numerous stereotypes: "Irish, Jews, and gays all have high verbal skills"; gays "deployed" AIDS as a "self-inflicted . . . 'suffering situation[ ]' to elicit sympathy and induce guilt").

<sup>32</sup> URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 3–5 (1992).

<sup>33</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 543 n.254 (1998).

<sup>34</sup> See Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 538 (1992). Currently eighteen states have antisodomy laws; in five of those states (Arkansas, Kansas, Missouri, Oklahoma, and Texas), the statutes apply only to same sex activity. Kathy Lohr, *Challenging Anti-Sodomy Laws*, (NPR radio broadcast, Jan. 11, 1999), available in 1999 WL 3000204.

While hate crime legislation has proliferated rapidly since 1990,<sup>35</sup> hate crime laws include sexual orientation in fewer than half of the states.<sup>36</sup> Even in those states that do protect sexual orientation, what is institutionalized is in many cases an empty framework that includes underprosecution and accusing complainants of oversensitivity.<sup>37</sup>

In the past decade, we have seen an increase in local statutes and ordinances prohibiting discrimination in employment, housing, and public accommodations on the basis of sexual orientation. Eleven such states<sup>38</sup> and over 100 such municipal ordinances exist today.<sup>39</sup> But, the Senate has twice fallen short of the votes needed to pass the Employment Non-Discrimination Act.<sup>40</sup>

Three states, 64 cities and counties, 83 colleges and universities, and 476 private companies offer some form of domestic partner benefits.<sup>41</sup> But in 1996, Congress passed the Defense of Marriage Act ("DOMA") by "overwhelming

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<sup>35</sup> See Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (codified in part at 28 U.S.C. § 534 (1994)); Valerie L. Brown, *Birt-h of Consciousness: Hate Crimes (and Hate Speech) on Campus—A Review of Wisconsin v. Mitchell*, 90 EDUC. L. REP. 979 (1994).

<sup>36</sup> See NATIONAL GAY & LESBIAN TASK FORCE POLICY INST., CAPITAL GAINS & LOSSES: A STATE BY STATE REVIEW OF LESBIAN, GAY, TRANSGENDER, AND HIV/AIDS-RELATED LEGISLATION IN 1997, at 2, 56 (1997) (listing 21 states).

<sup>37</sup> See Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 566-67 (1998).

<sup>38</sup> See CAL. LAB. CODE § 1102.1 (West 1997); CONN. GEN. STAT. ANN. §§ 46a-81c (West 1997); HAW. REV. STAT. ANN. §§ 368-1, 378-2 (Michie 1996); ME. REV. STAT. ANN. tit. 5, § 5472 (West 1996); MASS. ANN. LAWS ch. 272, § 98 (Law. Co-op. 1996); MICH. STAT. ANN. §§ 3.548(102), 37.2103(3) (Callaghan 1996); MINN. STAT. §§ 363.03, 363.12 (1996); N.J. REV. STAT. §§ 10:2-1, 10:5-4, 10:5-12 (1996); R.I. GEN. LAWS § 28-5-7 (1996); VT. STAT. ANN. tit. 3, § 495 (1996); WIS. STAT. ANN. § 111.36(1) (West 1997); D.C. CODE ANN. § 1-2512 (1997); see also James P. Baker, *Equal Benefits for Equal Work? The Law of Domestic Partner Benefits*, 14 LAB. LAW. 23, 26 n.11 (1998).

<sup>39</sup> See Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267, 278 n.29 (1998).

<sup>40</sup> See *The Employment Non-Discrimination Act of 1997*, S. 869, H.R. 1858, 105th Cong. (1997); *Employment Non-Discrimination Act of 1996*, S. 2056, 104th Cong. (1996); 142 CONG. REC. D912 (daily ed. Sept. 10, 1996) (Senate rejected by one vote).

<sup>41</sup> See Paul L. Spackman, Note & Comment, *Grant v. South-West Trains: Equality for Same-Sex Partners in the European Community*, 12 AM. U. J. INT'L L. & POL'Y 1063, 1064 n.2 (1997) (noting that "only 428 companies in the United States . . . provide domestic partner benefits and that for every company providing benefits there are at least twenty companies in which gay and lesbian employees are asking for these benefits"); Human Rights Campaign, *WorkNet Employer Database*, (last modified Mar. 20, 2000) <<http://hrc.org/issues/workplac/dp/dplist.html>> (listing 2,933 employers that offer domestic partner health benefits).

majorities of both houses of Congress."<sup>42</sup> Over half the states have adopted local versions of the DOMA, while Attorneys General's opinions accomplish the same result in a handful of additional states.<sup>43</sup>

What is evolving in the way of protection for sexual others is a legal regime of bone-tossing. You have domestic partner benefits, you do not need (or deserve) marriage. You cannot be prosecuted for sodomy in 32 states, but you cannot talk about your intimate partner in *any* state or you will not be able to serve in the military. Large areas of formal inequality remain entrenched; in forty states employers have the ability to fire workers simply for being gay;<sup>44</sup> in housing, in access to public services, parenting rights, inheritance, immigration, and tax benefits, gay unions are denied equality; the ban on same sex marriage not only denies tangible economic consequences, but a host of intangible and symbolic cultural benefits that flow from marriage.

One reading of the Supreme Court's gay and lesbian jurisprudence is that the Court has countenanced a patchwork of hate-based indifference. If Cincinnati wants to prohibit "special privileges" or "preferential treatment" for the ostensible government purpose of conserving costs that would be expended in investigating and trying discrimination cases, Cincinnati can do that, as long as Cincinnati does not act purely from discriminatory "animus."<sup>45</sup> We call this the laboratory of the states, and we reassure ourselves that because of it, democracy is working.

This is a legally enforced regime of tolerance that tames differences, quiets political action, makes secrecy compulsory, condones stigma, and ultimately entrenches inequality.<sup>46</sup> One of the greatest legal challenges for sexual others is to confront this institutionalization of second class citizenship.<sup>47</sup>

<sup>42</sup> Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 150 (1998).

<sup>43</sup> See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 296-98 (1999).

<sup>44</sup> Only ten states and the D.C. ban discrimination based on sexual orientation. See William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 HASTINGS L.J. 1101, 1105 (1997).

<sup>45</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 298-301 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998). I believe in a somewhat less cynical or at least more optimistic interpretation. See *infra* text at notes 159-60.

<sup>46</sup> See Herbert Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 81, 81 (R. Wolff et al. eds., 1965) ("[W]hat is proclaimed and practiced as tolerance today is in many of its most effective manifestations serving the cause of oppression.").

<sup>47</sup> See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1883 (1997); Eloise Salholz et al., *For Better or for Worse*, NEWSWEEK, May 24, 1993, at 69 (according to gay rights advocate Thomas B. Stoddard, "[d]omestic partnership is, for better or worse, second-class

### D. Law and Cultural Re-Presentation: Coercing Invisibility

It is not easy to show a direct causal relation between the silencing techniques of law and the cultural silencing of these facets of identity, but consider the evidence. Surely, it is not accidental that the law says lesbians and gays cannot marry, adopt or become foster parents<sup>48</sup> and that mainstream television and movies contain virtually no portrayal of gay and lesbian parenting or family life. It is more than coincidence that the United States government's "don't ask, don't tell" policy prohibits knowing or divulging sexual orientation and that schools silence gay and lesbian student groups, and attempt to ban any materials or discussion of homosexuality in school curricula.<sup>49</sup>

Government's failure to protect gays and lesbians from violence and from employment discrimination is certainly not unrelated to the cultural code of silence that pressures nonstraights "to stay silent about significant aspects of their personal or family lives."<sup>50</sup> Ultimately this may lead to self-silencing. Each year gay youths constitute up to 30% of successful teenage suicides: "Suicide may be a way of making sure that no one ever knows."<sup>51</sup>

At times the legal and the cultural are inextricable: the refusals to allow gay pride marchers the right to march in St. Patrick's Day parades impinges not only on the rights of sexual others, but also their practical ability to culturally

citizenship").

<sup>48</sup> See, e.g., FLA. STAT. ANN. § 63.042(3) (West 1997); N.H. REV. STAT. ANN. § 170-B:4, 170-F:6 (1994); *In re Pima County Juvenile Action B-10489*, 727 P.2d 830, 835 (Ariz. Ct. App. 1986) ("It would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other create a parent after that proscribed model.").

<sup>49</sup> See Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661, 2669 (1997) (book review) ("With the exception of sodomy and solicitation cases in criminal law and a few recent constitutional law cases, gay men and lesbians remain invisible in courses other than those that are explicitly dedicated to sexual orientation and the law."); Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1642-46 (1995) (citing state statutes requiring that sex education in schools discourage homosexuality); Carolyn Moreau, *Coming Out of the Closet: Schools Address Homosexuality*, HARTFORD COURANT, July 7, 1996, at A1 (school boards across the country have taken "dramatic actions to keep discussions of homosexuality out of schools"); see also Cara DeGette, *Students Lose Bid for Gay Club at School*, DENVER POST, Feb. 5, 1999, at B03; Kristen Moulton, *Dispute over Gay Group Costs School*, DALLAS MORNING NEWS, Dec. 11, 1998, at 56A.

<sup>50</sup> Jennifer Durkin, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession*, 8 UCLA WOMEN'S L.J. 343, 364 (1998).

<sup>51</sup> Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE L.J. & FEMINISM 269, 271 (1996) (quoting University of Minnesota pediatrician Gary Remafedi).

constitute a group identity.<sup>52</sup>

Law and cultural representations work together to create meaning. Law reflects social forces, but it also shapes them.<sup>53</sup> In the absence of legal regulation, negative cultural representations have more room to flourish. Proactively, laws send cultural messages; they *give permission*.<sup>54</sup> The effects of this permission are apparent in statistics that show antigay violence "is escalating more than any other category of hate crime"<sup>55</sup> and in the visible incarnations of the hatred, such as the killing of Matthew Shepard and Billy Jack Gaither and the beating and carving of Adam Colton.

In the past decade, legal theorists have struggled to change laws and doctrines that prevent sexual minorities from achieving equality. They have done so with varying degrees of sensitivity to the cultural reception of their arguments.

### III. GAY LEGAL THEORY AND CONSTITUTIONAL DOCTRINE

In seeking acceptance by mainstream culture, many gay legal theorists seem to divide between what I term an outsider or antistatutory strategy and a formal equality model. Although the paths of equality and outsider theorists are not exclusive, outsiders use a variety of theoretical devices to challenge prevailing models of heterosexuality as the norm, and more broadly to destabilize traditional understandings of sex, gender roles, and sexual orientation. They graphically depict the ways in which sexual nonconformists have been constructed as sexual deviants in the hopes that revealing this artificial social and

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<sup>52</sup> See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 559 (1995) (upholding the exclusion of Irish gay pride group from privately sponsored St. Patrick's Day Parade); William N. Eskridge, *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2457-58 (1997) (noting that although the Supreme Court saw *Hurley* as a First Amendment case, it was litigated in state court as a public accommodations case; and commenting, "Doctrinally, the queerest feature of the opinion is the way the Court's governing precedent, *Roberts*, disappeared into a legal closet.").

<sup>53</sup> See, e.g., R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 960 (1998) ("[L]aw shapes social practices even as it takes account of them."); Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 20-21 (1994) ("[C]ourts in important instances not only decide disputes, they also transform particular legal controversies and rights claims into larger public messages.").

<sup>54</sup> Cf. COMER VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 81-82 (3d rev. ed. 1974) (describing *Plessy v. Ferguson* and other similar decisions as "permission to hate" signals from the Supreme Court).

<sup>55</sup> Paul Beeman, *PFLAG President's Statement for Matthew Shepard Candlelight Vigil* (last modified Oct. 14, 1998) <<http://www.pflag.org/press/releasem.html>>.

legal construction of norms and deviance will develop understanding of and tolerance for sexual outsiders.

Other gay legal theorists have devoted more energy toward demonstrating the ways in which sexual outsiders look very much like the "ideal model"—the heterosexual norm—as loving parents, and caring, committed partners. Equality theorists accept for the most part the given identity categories of homosexuals and heterosexuals, but try to show that sexual differences should not make a difference, socially or legally. Equality theorists may be agnostic on the issue or even question whether the heterosexual norm is truly an ideal, but they accept it as the paradigm cultural model. Equality-seeking political activists must be prepared to argue that to the extent an ideal model of family life exists, gays and lesbians conform to that snapshot. Thus, equality theory does not depend on acceptance of the model as an ideal, but equality seeking, as a practical matter, does.

Conflicts between equality and outsider theorists are revealed most starkly in literature on military service and marriage.<sup>56</sup> Equality theorists seek official recognition of their unions in the hopes that this assimilationist strategy will develop understanding and tolerance and ultimately dismantle the idea of a despised, less worthy sexual "other." These are often not exclusive goals—and a single theorist may employ both strategies—but the objectives certainly entail differences in emphasis and focus.

### A. Outsider Strategies

The initial outsider strategy challenged both the norm and the presumed superiority of heterosexuality. The early writings of Adrienne Rich questioned the existence of a sharp dichotomy between heterosexuality and homosexuality, offering instead her idea of a "lesbian continuum."<sup>57</sup> In *Compulsory Heterosexuality and Lesbian Existence*, Rich argued that women bond with other women in many ways, giving each other meaningful and intimate social and political support through talks, work, and shared child care, motherhood, sisterhood, romantic friendships, and sometimes sexual intimacy. She also questioned the institution of marriage, the traditional hallmark of heterosexual unions, revealing its darker side for women: "motherhood as unpaid production . . . prescriptions for 'full-time' mothering [at home]; enforced economic dependence of wives; . . . [and] restriction of female self-fulfillment to marriage and motherhood," and its doubled workload for women and its sexual

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<sup>56</sup> See *infra* text accompanying notes 63–65, 75–79.

<sup>57</sup> See Adrienne Cecile Rich, *Compulsory Heterosexuality and Lesbian Existence*, in THE SIGNS READER: WOMEN, GENDER & SCHOLARSHIP 139, 139–68 (Elizabeth Abel & Emily K. Abel eds., 1983).

division of labor.<sup>58</sup>

Later theorists joined the project to destabilize heteronormativity. They explain the ways in which cultures, courts, and theorists have conflated the meanings of sex, gender, and sexual orientation.<sup>59</sup> They have searched for new "linguistic and conceptual tools to talk about sexual difference."<sup>60</sup> One technique was to reclaim the word "queer," transform it into a nonderogatory term, and make it a symbol of resistance and activism.<sup>61</sup> Another political tactic developed in the 1990s was "outing"—exposing the sexual orientation of closeted gays and lesbians and forcing them out of the closet.<sup>62</sup> Some criticized the institution of marriage itself, charging that it reinforced a variety of gender and familial hierarchies.<sup>63</sup>

These challenges to the norm of heterosexual unions extended to the development of specific doctrinal suggestions, such as premarital security agreements, which "could queer legal doctrine regulating marriage."<sup>64</sup> The destabilization project of outsider theory contrasts with the stability that equality theory gives to heterosexual unions—they are the foundational norm on which comparisons and claims of equal rights are based. The rhetoric of antisubordinationists is that of liberation, and they believe that only radical challenges to traditional norms will ever transform America into a truly plural democracy.<sup>65</sup>

<sup>58</sup> *Id.* at 147.

<sup>59</sup> See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 9–18 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 63–64 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

<sup>60</sup> LISA DUGGAN, *Queering the State*, in SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 179, 192 (1995).

<sup>61</sup> See MICHAEL WARNER, FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY xxi–xxv (1993); Valdes, *supra* note 59, at 346–50.

<sup>62</sup> See David Gelman, 'Outing': An Unexpected Assault on Sexual Privacy: Gay Activists Are Forcing Others Out of the Closet, NEWSWEEK, Apr. 30, 1990, at 66; William A. Henry III, To "Out" or Not to "Out," TIME, Aug. 19, 1991, at 17.

<sup>63</sup> See, e.g., Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 20 (Suzanne Sherman ed., 1992); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1539–40 (1993).

<sup>64</sup> Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215, 1219 (1998).

<sup>65</sup> See, e.g., Polikoff, *supra* note 63, at 1536 ("[T]he desire to marry in the lesbian and gay

Queer theorists demonstrated the constructed nature of sexual identity and consistently rejected a sharp opposition between heterosexuality and homosexuality.<sup>66</sup> Sexuality exists on a continuum and this blurs the lines between the categories of heterosexuals, bisexuals, transsexuals, and homosexuals. The destabilization project was intended to strip heterosexuality of its "naturalized status" and its artificial superiority.<sup>67</sup> If heterosexuality was simply not "natural," homosexuality would no longer be a chosen form of perversion.

A number of outsider theorists boldly and eloquently emphasize the distinctiveness of being a sexual "other." Frank Valdes, for example, urges gays to engage in "sex talk," forthright expression of same-sex desire, as "a key to self development and community formation; . . . a means of expressing our selves . . . [and] of altering the dominant culture's political and legal misconceptions of lesbians and gays."<sup>68</sup> Other theorists have explained that the process of "coming out," or publicly revealing their sexual orientation, is one with personal, social, and political significance: it not only shapes individual identity, but may help create a political community.<sup>69</sup>

Outsider scholarship, particularly the experiential narratives of oppressed groups, have provoked considerable debate in academic circles about the traditional stories law tells and the points of view that have been excluded.<sup>70</sup> The

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community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.").

<sup>66</sup> See generally MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., 1978) (explaining why certain forms of discourse have taken shape in the West during the last three centuries); DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1836 (1993).

<sup>67</sup> Ertman, *supra* note 64, at 1219.

<sup>68</sup> Francisco Valdes, *Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the End of the Twentieth Century*, 1 J. GENDER, RACE & JUST. 213, 215 (1997).

<sup>69</sup> See Eskridge, *supra* note 52, at 2440; Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 89, 117 (1998).

<sup>70</sup> See generally Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994) (focusing on the resistance to legal storytelling); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415 (1989) (examining "the use of stories in the struggle for racial reform"); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 608 (1994) (explaining that "outsider" scholarship challenges the law's agenda, assumptions, and biases); Marc A. Fajer, *Authority, Credibility, Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994) (exploring the existence of pre-understanding in the outsider narrative context); Daniel



stories also seem to be effective in slowly changing cultural perceptions about sexual others.<sup>71</sup> In the absence of mainstream political support, however, the narrative methodologies of gay legal theorists have been successful only sporadically in prompting judicial and legislative changes.<sup>72</sup>

### B. Formal Equality Strategies

Although these camps are not exclusive, other gay legal theorists frame their principal objective as the attainment of formal equality with heterosexuals or opposite-sex couples. As William Eskridge capsulized, "Essential to [ending all vestiges of legal discrimination] is the adoption of laws guaranteeing equal rights for lesbian and gay couples."<sup>73</sup> Many equality theorists believe that normalization of homosexuality can itself be transformative.<sup>74</sup>

Andrew Sullivan, for example, while questioning the public, legislative aspects of a civil rights model, argues strongly in favor of legal recognition of same-sex marriages: "If nothing else were done at all, and gay marriage were legalized, ninety percent of the political work necessary to achieve gay and lesbian equality would have been achieved. It is ultimately the only reform that matters."<sup>75</sup> The title of Sullivan's book, *Virtually Normal: An Argument About Homosexuality*, implies the comparison to the heterosexual norm.

The form of argument remained the same with respect to marriage rights, access to military service, employment benefits and protections, and child custody. These laws deprived gays, lesbians, and bisexuals of equal rights to

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A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (provoking thought on the appropriate role of storytelling in legal scholarship).

<sup>71</sup> See, e.g., David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 77 (1997).

<sup>72</sup> See, e.g., William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Norms, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 943 (1997) (describing the difficulties of legislative lobbying for same sex marriage rights in the 1970s); see also Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841 (1998) (analyzing Congress's use of narratives to justify DOMA).

<sup>73</sup> WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 10 (1996).

<sup>74</sup> See, e.g., Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 349 n.56 (1998).

<sup>75</sup> ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 181-85 (1995).

minimal, fundamental protections enjoyed by all other citizens.<sup>76</sup> Some equality theorists claimed that denial of these protections was discrimination based on sexual orientation (which ought to be a protected status category); others maintained that these exclusions were sex discrimination.<sup>77</sup>

The battle was relentlessly uphill, with plaintiffs marshalling what empirical, narrative, logical, and moral arguments they could to demonstrate that homosexuals were no different than heterosexuals in any relevant way and were thus worthy of similar entitlements.

The arguments of the equality theorists centered on demonstrating the circularity of reasoning among those opposing same-sex unions (marriage is definitionally restricted to opposite-sex couples), the fundamental nature of the right to marriage, and the lack of a compelling state interest in prohibiting same-sex marriages.<sup>78</sup> The equality theorists want not only the considerable material benefits from state sanction of their unions, but also the symbolic and declarative recognition that it brings.<sup>79</sup> Some are willing to engage in the difficult line-drawing that equality theory demands. William Eskridge, for example, accepts that distinctions can be drawn between committed partnerships and multiple relationships.<sup>80</sup>

Formal equality theory seemed sensible, particularly in light of poll data showing that a majority of Americans supported equal rights for homosexuals, at least in the workplace.<sup>81</sup> Yet reliance on popular impulses toward equal rights

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<sup>76</sup> See Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 238–39 (1995); Diane H. Mazur, *Re-Making Distinctions on the Basis of Sex: Must Gay Women Be Admitted to the Military Even If Gay Men Are Not?*, 58 OHIO ST. L.J. 953, 963–70 (1997); Julia F. Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055, 1060–64 (1995).

<sup>77</sup> See generally Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (arguing that discrimination against gays and lesbians oppresses women); Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992) (explaining why Title VII bars discrimination against homosexuals).

<sup>78</sup> See, e.g., Christine Jax, *Same-Sex Marriage—Why Not?*, 4 WIDENER J. PUB. L. 461, 464–66 (1995).

<sup>79</sup> See Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES, *supra* note 63, at 13, 14–19. See generally Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994–1995) (addressing opposition from homosexuals to the fight for marriage rights).

<sup>80</sup> See William N. Eskridge, Jr., *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 307, 313 (1998).

<sup>81</sup> See *The Employment Non-Discrimination Act, 1996: Hearings on H.R. 1863 Before*

possessed Orwellian limitations. In the view of the general public, some rights were more equal than others, and more than half of all Americans opposed same sex marriage and adoption rights.<sup>82</sup>

It was not the heart of equality theory—requests for the same constitutional rights enjoyed by all other citizens—that was problematic, but the interpretation. The approach requires a comparison between sexual others and some idealized heterosexual norm. The implementation of this comparison by courts and legislatures was perhaps less formalist and more “normalist”: they abandoned equality theory precisely at the moment that a genuine egalitarian attitude was most needed. Equality theory succumbed to a normalist decisional approach—too willing to accept the received wisdom as a justification for inequality,<sup>83</sup> and too ready to be persuaded that departures from the norm are harmful and may be punished by unequal treatment.<sup>84</sup>

Claims for equal rights were met in the political arena with charges that sexual minorities sought “special protection,” a favored status based on their sexual preferences. The “special rights” rhetoric was behind several successful campaigns to repeal antidiscrimination ordinances.<sup>85</sup> It was part, as Jane Schacter noted, of a “discourse of equivalents” that compared homosexuals to heterosexuals and sexual orientation to other protected categories such as race, gender, and religion.<sup>86</sup> Gay rights opponents thus denied discrimination by claiming that gay men and lesbians were affluent, well educated, and politically

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*the Subcomm. on Government Programs of the House Comm. on Small Businesses*, 104th Cong. 42 (1996) (statement of Elizabeth Birch) (citing Human Rights Campaign polls finding that 74% of all Americans supported equal employment rights for homosexuals); Mark Gillespie, *Americans Support Hate Crimes Legislation That Protects Gays* (last modified Apr. 7, 1999) <<http://www.gallup.com/poll/releases/pr990407.asp>> (issuing results of a February 1999 Gallup poll in which “83% of Americans said gay men and women should have equal rights in the workplace”).

<sup>82</sup> See Tom Morganthau, *Baptists vs. Mickey: Why the Boycott Against Disney Faces Steep Odds*, NEWSWEEK, June 30, 1997, at 51 (citing a Newsweek poll showing “that the public still opposes gay marriage (56 to 35 percent) and adoption (49 to 40 percent)”).

<sup>83</sup> See *infra* text accompanying notes 116–17 (regarding acceptance of military cohesion rationales for excluding known homosexuals from military service).

<sup>84</sup> See *infra* text accompanying note 194 (regarding courts depriving gay and lesbian parents of child custody because their choices of sexual partners differed from the norm).

<sup>85</sup> The proponents of Colorado’s Amendment No. 2 developed bumper stickers proclaiming “Equal rights, not special rights.” Jeffrey Rosen, *Disoriented*, NEW REPUBLIC, Oct. 23, 1995, at 24. See generally Samuel A. Marcossan, *The “Special Rights” Canard in the Debate over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 137 (1995) (dissecting what “special rights” means and giving answers to the “special rights” argument).

<sup>86</sup> Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 285 (1994).

powerful. The equal rights rhetoric compelled what Schacter calls a "misguided search for sameness," a need to fit discrimination against sexual others into a rigid template established by gender and race cases, when the actual phenomenology and patterns of discrimination against homosexuals differed markedly from those of other disempowered groups.<sup>87</sup>

### *C. Theoretical and Practical Limits of Formal Equality and Outsider Strategies*

Equality thinkers and outsider advocates have reached a theoretical stalemate regarding identity, assimilation, and the social construction of differences. Equality theorists believe that by emphasizing the ways homosexuals resemble heterosexuals, sexual minorities will get into the room to begin transformation of cultural beliefs. Their strategy is integration first, recognition of differences later. Outsiders believe that true acceptance necessitates acceptance of differences, and that an initial acknowledgement of differences between heterosexuals and sexual minorities is vital. The integration they seek is "integration of the public and private lives of gay men and lesbians, not simply integration into society."<sup>88</sup> This debate about the best way to achieve equality is reminiscent of the sameness-difference debate in feminist circles and the integrationist-segregationist dispute in critical race theory.<sup>89</sup> This Section will discuss the theoretical flaws of both equality and outsider theories. It also examines the practical reception of both theories by courts and the popular media.

#### *1. The Assimilation Critique of Formal Equality Theory*

Outsider theorists have a variety of objections to any strategy that seeks to show sameness to obtain equality. One primary concern centers on the idea that if sexual others try to show the same entitlement to rights as straights, they will

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<sup>87</sup> See *id.* at 299.

<sup>88</sup> Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 355 (1999).

<sup>89</sup> See, e.g., Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1426 (1997); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 894-98 (1993); Alex M. Johnson, Jr., *Bid Whist, Tonk and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401, 1436-38 (1993); Donna Thompson-Schneider, *The Arc of History: Or, the Resurrection of Feminism's Sameness/Difference Dichotomy in the Gay and Lesbian Marriage Debate*, 7 LAW & SEX. 1, 7-14 (1997).

be forced to hide their unique or distinctive traits. Kenji Yoshino is concerned that the current equal protection model forces assimilation by requiring outsider groups to establish their similarities to race and sex.<sup>90</sup> This, says Yoshino, "encourage[s] outsiders to assimilate by changing or hiding their defining characteristic."<sup>91</sup> Robin West argues the point as a matter of opportunity costs:

When we fail to acknowledge salient differences between lesbianism and heterosexuality and between gay life and straight life, we entirely lose on the opportunity to glean moral insights from the experiences of the former. . . . [A]n embrace of gay and lesbian sexual practices may prompt a re-invigorated critical examination of—and hence improvement upon—heterosexual norms, institutions, and practices, and the moral sense to which those experiences arguably give rise.<sup>92</sup>

Some outsider theorists fear that a challenge from the inside will never transform the patriarchal nature of society's most prominent institutions. These theorists think that an equality-based model represents a wholesale acceptance of the culture's heterosexual history, traditions, and values.<sup>93</sup>

Other scholars are concerned that arguments based on sameness will work, if at all, only for those gays and lesbians who most closely approximate the mainstream heterosexual model. For other sexual minorities, "[t]hose who live at the intersection of persistent racism, sexism, poverty," equalizing strategies will never gain them acceptance and put them at risk of greater marginalization.<sup>94</sup> Poor, nonwhite committed monogamous gay couples will not be treated like upper middle class white committed monogamous gay couples. Since mainstreaming will work selectively, at best, to the extent that an equality strategy relies on a heterosexual ideal, it risks polarizing and destroying a sense of community among sexual minorities.

Several theorists have even argued that an equality model is most likely to provoke a backlash. As the media in the 1990s was filled increasingly with stories "portraying gays and lesbians as normal people who serve in the military, raise children, and live in stable relationships. . . . this narrative created a breach

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<sup>90</sup> Yoshino, *supra* note 33, at 487.

<sup>91</sup> *Id.*

<sup>92</sup> Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 *FORDHAM L. REV.* 1313, 1329 (1997).

<sup>93</sup> See Polikoff, *supra* note 63, at 1549–50.

<sup>94</sup> Sheila Rose Foster, *The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage*, 7 *TEMP. POL. & CIV. RTS. L. REV.* 319, 325 (1998) ("What will result is a gay version of the 'Huxtable Family Syndrome,' where the social acceptance promised by civil rights reforms is available only to those who are sufficiently 'just like' those currently occupying the mainstream.").

in society's generally accepted sense of order."<sup>95</sup> According to Jack Balkin, the less gays and lesbians look like outcasts and the more they resemble members of the mainstream, the more dominant groups will fight to preserve the existing status hierarchy.<sup>96</sup>

## 2. Formal Equality in the Courts

Some of the theoretical concerns regarding equality theory played out in practice, particularly the concern that if heterosexuals were the touchstone of the equality model, the differences of sexual identity would be overlooked. *Oncale v. Sundowner Offshore Services, Inc.*,<sup>97</sup> although a case of statutory construction of Title VII, was essentially a victory for formal equality theory. It is also a good example of the limitations of the equal rights model. Joseph Oncale's complaint arose from repeated and persistent sexual taunts, physical assaults, and threats of rape by his immediate supervisors and two coworkers. During one of these incidents, his supervisor restrained Oncale while one of his coworkers forced a bar of soap into his anus.<sup>98</sup> Oncale testified that he ultimately was forced to quit his job because he believed that "if I didn't leave my job, I would be raped or forced to have sex."<sup>99</sup>

In a relatively brief opinion by Justice Scalia, the Court held that workers could sue for same-sex sexual harassment. Scalia, however, kept the case firmly grounded in an antisex discrimination equal rights framework: "The critical issue, Title VII's test indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."<sup>100</sup> The formal equality framework compares the treatment of persons in the category of males with the treatment of persons in the

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<sup>95</sup> Butler, *supra* note 72, at 861-62.

<sup>96</sup> See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2337 (1997).

Any departure from a baseline that views homosexuality as deviant and immoral will be viewed by some members of the dominant status group eager to retain their status as a movement toward treating homosexuality as normal and morally appropriate.

In this zero-sum world, tolerance for homosexuals can be reconciled with their lower social status only so long as this tolerance is given grudgingly and without any social or moral approval of homosexuality.

*Id.* at 2336-37.

<sup>97</sup> 523 U.S. 75 (1998).

<sup>98</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996).

<sup>99</sup> *Oncale*, 523 U.S. at 77.

<sup>100</sup> *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

category of females. This, of course, omits potential plaintiffs who do not fit neatly into the categories, such as bisexuals or transsexuals.<sup>101</sup> It also omits perpetrators who engage in sexually offensive conduct that affects the terms and conditions of the plaintiff's employment, but who do not differentiate neatly between the categories of males and females.

The Court's emphasis that harassment must be "because of sex," and its requirement that one sex must suffer disadvantages that the other does not, may be read to leave open a curious defense that undermines the purposes of Title VII. The victim of an "equal opportunity" harasser, one who harasses both women and men, would be unable to demonstrate differential treatment compared to members of the other sex. Several insensitive lower courts have read *Oncale* this way and have concluded that the victim of a harasser who targets both sexes equally cannot establish a claim.<sup>102</sup> Other courts have quite rightly recognized that if gender supplies the motive and defines the content of the harassment—if it is a gendered assault in form and substance—then it is counterintuitive to conclude no gender discrimination exists simply because the perpetrator has harassed both male and female victims.<sup>103</sup> The *Oncale* Court omitted consideration of the equal opportunity harasser other than the oblique line that "[a] same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."<sup>104</sup> The lower courts are split regarding whether an equal opportunity harasser can escape Title VII liability.<sup>105</sup>

*Oncale*'s consideration of male-on-male harassment using the heterosexual

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<sup>101</sup> See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) ("Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case . . . Title VII does not prohibit discrimination against transsexuals.").

<sup>102</sup> See, e.g., *Holman v. Indiana*, 24 F. Supp. 2d 909, 915–16 (N.D. Ind. 1998); *Romero v. Caribbean Restaurants, Inc.*, 14 F. Supp. 2d 185, 190, 193 (D.P.R. 1998).

<sup>103</sup> See, e.g., *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994); *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wyo. 1993).

<sup>104</sup> *Oncale*, 523 U.S. at 80–81.

<sup>105</sup> Compare, e.g., *McDonnell*, 84 F.3d at 260 ("It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female."), with *Butler v. Ysleta Indep. School Dist.*, 161 F.3d 263, 270 (5th Cir. 1998) (holding that the defendant's "sending of offensive materials to both men and women is evidence that the workplace itself, while perhaps more sexually charged than necessary, was not sexually charged in a way that made it a hostile environment for either men or women").

ideal may seriously constrain the possibilities for using Title VII doctrine to challenge sexual stereotyping. The Court was presented with the issue of whether Oncale was targeted for abuse because of intrasexual stereotyping because Joseph Oncale was a small man who did not "conform to traditional norms of masculinity."<sup>106</sup> The Court, however, refused to consider whether sexual harassment law prohibits conduct that reinforces sexual stereotypes. Justice Scalia seemed determined to avoid questions of whether workplace norms subordinate sexual others or privilege definitions of masculinity that themselves create hierarchies. The effeminate man or masculine woman who is harassed because he or she does not conform to the ideal of his or her gender may be without a remedy.<sup>107</sup>

The failures of an idealized model are also seen in the ways they reinforce traditional gender norms and biases. Indeed, Justice Scalia's opinion is laden with language that resonates with the cultural norms of both heterosexuality and traditional gender behaviors. The *Oncale* majority went further than implicitly assuming that most male perpetrators of sexual harassment are heterosexual. Justice Scalia explicitly assumes the abnormality of any sexual overtures other than between members of the opposite sex: "Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex."<sup>108</sup> This heterocentrist model abnormalizes voluntary homosexual, bisexual, or transgendered sexual encounters.

Since the comparative populations in a formal equality model—the "opposite" sexes—are built on traditional understandings, actionable conduct

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<sup>106</sup> See Brief of Law Professors as Amici Curiae in Support of Petitioner at 15, *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996) (No. 96-568); see also Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

By regarding each member of a sexual group as a fungible representative of the class of subordinators or subordinated, it eliminates the possibility that men could discriminate against other men, through harassment or other means, because the latter fail to live up to the societal expectations of 'proper' masculinity, or that women could engage in the same or similar behavior toward other women who fail to embody a particular standard of femininity.

*Id.* at 755.

<sup>107</sup> See, e.g., *Garrity v. Nationsbank of Texas, N.A.*, No. CIV. 3:98CV0437-H, 1999 WL 76785, at \*6 n.6 (N.D. Tex. Feb. 3, 1999) (holding explicitly that Title VII affords no cause of action for sexual stereotyping).

<sup>108</sup> See *Oncale*, 523 U.S. at 80; see also Jennifer Ann Drobac, *Pansexuality and the Law*, 5 WM. & MARY J. WOMEN & L. 297, 304 (1999).



may be defined and similarly constrained by the current behaviors of those populations. Justice Scalia's careful exposition in *Oncale* of what sexual harassment is *not* attests to this limitation. Dicta in the opinion offers considerable support for traditional gender role stereotypes. Courts and juries, Scalia emphasizes, should "not mistake ordinary socializing in the workplace" for discrimination.<sup>109</sup> Ordinary socializing, he explains, consists of behaviors "such as male-on-male horseplay or intersexual flirtation" and "simple teasing or roughhousing among members of the same sex."<sup>110</sup> Indeed, the definition of what is sufficiently hostile or abusive conduct will remain mired in traditional gender norms because Title VII "does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."<sup>111</sup>

The limitation of using a formal equality model for legal decisions that address issues affecting the gay community is not just that frailties of heterosexual relationships, such as traditional gender norms or divisions of labor, will be imported. The concern is that the equality model cannot begin to comprehend the subtleties of sex and gender stereotyping, the variations among sexual others, and the abuses along dimensions of power that are unredressable under current law. *Oncale* illustrates that, even in the midst of a victory, strict equality theory fails to recognize important differences between sexual majorities and minorities and fails to challenge gender stereotypes.

The military exclusion cases illuminate the other side of the coin. The mirror difficulty with the equality theory is that differences that are recognized are those that the dominant culture uses as measures of condemnation; *Able v. United States*<sup>112</sup> demonstrates this point. In *Able*, a group of gay and lesbian service members filed suit to challenge the "don't ask, don't tell"<sup>113</sup> policy as violative of the First Amendment, equal protection, and substantive due process. In a long

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<sup>109</sup> See *Oncale*, 523 U.S. at 81.

<sup>110</sup> *Id.* at 81–82.

<sup>111</sup> *Id.* at 81. See, e.g., *Johnson v. Hondo, Inc.*, 125 F.3d 408 (7th Cir. 1997).

Most unfortunately, expressions such as 'fuck me,' 'kiss my ass,' and 'suck my dick,' are commonplace in certain circles, and more often than not, when these expressions are used (particularly when uttered by men to other men), their use has no connection whatsoever with the sexual acts to which they make reference—even when they are accompanied, as they sometimes were here, with a crotch-grabbing gesture.

*Id.* at 412.

<sup>112</sup> 968 F. Supp. 850 (E.D.N.Y. 1997).

<sup>113</sup> National Defense Authorization Act for the Fiscal Year 1994, 10 U.S.C. § 654(b)(1) (1994) (setting forth what has been referred to as the military's "don't ask, don't tell" approach to gays in the military).

and thoughtful opinion tracing the history of prejudice against homosexuals, the United States District Court for the Eastern District of New York found that "the Act discriminates against homosexuals in order to cater to the prejudices of heterosexuals" and held that the statute "imposed unequal conditions on homosexuals as a prerequisite to serving their country in the armed forces."<sup>114</sup>

The Second Circuit reversed the district court.<sup>115</sup> Applying the rational basis test because no suspect or quasi-suspect classification was at issue and because the regulation was "based on conduct, not status," the court of appeals supported the differential treatment of homosexuals and heterosexuals.<sup>116</sup> The court noted a strong presumption of deference to Congress in military matters, and then accepted the government's justifications—promoting unit cohesion, protecting privacy of gays, and reducing sexual tension—with little reflection. Responding to the argument that these justifications are merely euphemisms for prejudice against homosexuals, the court again retreated behind the military shield, stating that the military needed "to foster 'instinctive obedience, unity, commitment, and esprit de corps.'"<sup>117</sup> The court of appeals made it a point to note that the government "can treat persons differently if they are not 'similarly situated.'"<sup>118</sup>

The Second Circuit never stated precisely how homosexuals and heterosexuals differ in ways that should matter for military service. Instead the court inferred that the two groups were not the same. What made the situation of homosexuals dissimilar to that of heterosexuals was nothing in their individual or personal qualities. It was the social constructions that attached to the identity characteristic that distinguished the two groups. The *Able* court concluded that it was not irrational for Congress to find that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."<sup>119</sup> The court's reference to "unit cohesion" was presumably based on the idea that the known presence of homosexuals might be disruptive because it could offend some heterosexuals who disapprove of homosexuality.<sup>120</sup> The idea that the

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<sup>114</sup> See *Able*, 968 F. Supp. at 865.

<sup>115</sup> *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998).

<sup>116</sup> *Id.* at 632.

<sup>117</sup> *Id.* at 634.

<sup>118</sup> *Id.* at 631. It may be argued that the appellate court decision in *Able* did not result from flaws in the equality model, but from intellectual laziness (seen in its deference to the military and its formulaic application of the rational basis test) that kept it from seriously considering similarities or differences. But the *Able* court plainly adopted the equality model and then summarily rejected the idea that homosexuals are at all similar to heterosexuals.

<sup>119</sup> *Id.* at 636.

<sup>120</sup> See *Able*, 968 F. Supp. at 858.

presence of homosexuals might undermine the military mission again relates to the political polarization over the issue, rather than any qualities homosexual service members possess.<sup>121</sup> Implicit in the appellate decision was the idea that homosexuals are different, but different not in personal qualities, only different in the ways they are perceived by people around them.

The military exclusion cases point to the way equality theory, in the hands of an unsympathetic appellate court, fails in one final respect. The categorical differences on which equality theory rests are based on identity characteristics that are matters of constructed oppositions. Elvia Arriola explains, "As long as homosexuality is characterized in opposition to, and deviating from, the standard of heterosexuality, it remains a 'difference' which neither merits nor receives an equality based analysis."<sup>122</sup> The appellate court in *Able* found that homosexuals and heterosexuals were not similarly situated. They were not dissimilar with respect to any immutable identity characteristics either group possessed, but with respect to traits constructed by culture: the popular perception of gays as perverse and immoral.

### 3. *Outsider Theory: Dominant Misunderstandings*

While extraordinarily useful in provoking academic debate and deepening intellectual understanding about lesbian, gay, bisexual, and transsexual experiences,<sup>123</sup> outsider theories have been notoriously unsuccessful in court.

One strategy advocated by gay legal theorists and urged by litigators was that homosexuals should be viewed as a suspect or quasi-suspect class for equal

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<sup>121</sup> The appellate court cited testimony of General H. Norman Schwarzkopf to make the point: "[i]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war." *Able*, 155 F.3d at 635.

<sup>122</sup> Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103, 117 (1994).

<sup>123</sup> See, e.g., Mark Blasius, *Contemporary Lesbian, Gay, Bisexual, Transgender, Queer Theories, and Their Politics*, 8 J. HIST. SEXUALITY 642 (1998); Richard R. Cornwall, *A Primer on Queer Theory for Economists Interested in Social Identities*, 4 FEMINIST ECONOMICS 73 (1998); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Joshua Gamson, *Must Identity Movements Self-Destruct—A Queer Dilemma*, 42 SOC. PROBLEMS 390 (1995); J. K. Gibson-Graham, *Queer(y)ing Capitalism in and out of the Classroom*, 23 J. GEOGRAPHY HIGHER EDUC. 80 (Mar. 1999); Shane Phelan, *The Shape of Queer: Assimilation and Articulation*, 18 WOMEN & POLITICS 55 (1997); Ruthann Robson, *Beginning from (My) Experience: The Paradoxes of Lesbian/Queer Narratives*, 48 HASTINGS L.J. 1387 (1997); Jacinth Samuels, *Dangerous Liaisons: Queer Subjectivity, Liberalism and Race*, 13 CULTURAL STUD. 91 (Jan. 1999).

protection purposes.<sup>124</sup> Despite arguments that gays were being subjected to differential treatment based on their status, many courts determined that the class of homosexuals was defined by conduct, and that the activity that defined homosexuality—sodomy—was not a constitutionally protected activity.<sup>125</sup> Other courts reasoned that gays and lesbians did not share the traditional suspect class factors; homosexuality was not immutable, homosexuals were not a discrete or insular group, and homosexuals—as a class—were not far enough outside the protection of the laws to be considered a suspect class.<sup>126</sup> Ultimately the courts have ruled almost uniformly that gays and lesbians do not constitute a suspect or quasi-suspect class.<sup>127</sup>

The suspect class strategy represented a very sensible effort to demonstrate the construction of gays and lesbians as different and to establish the invidious discrimination against them. The analysis was a valiant and thoughtful effort to work within the existing tiers of equal protection scrutiny—it was also an accurate description of a group that had been constructed as a discrete and insular minority—but one that would have concretized doctrinally permanent outsider

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<sup>124</sup> See, e.g., Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 240–42 (1993); Tracey Rich, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773, 774 (1988); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1753 (1996); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 810–11 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1287 (1985).

<sup>125</sup> See, e.g., *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 266 (6th Cir. 1995) (“Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected.”); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (“[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a ‘suspect class.’”).

<sup>126</sup> See, e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454, 465–66 (7th Cir. 1989) (“Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree . . . . In these times homosexuals are proving that they are not without growing political power.”); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1988) (“Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage.”).

<sup>127</sup> See *Equality Found.*, 54 F.3d at 267; *High Tech Gays*, 895 F.2d at 570–73; *Ben-Shalom*, 881 F.2d at 464 n.8; *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 102–04 (D.C. Cir. 1987); *Nat’l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270 (10th Cir. 1984); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1324 (E.D. Cal. 1993). But see *Watkins v. United States Army*, 837 F.2d 1428, 1446 (9th Cir. 1988); *Baehr v. Lewin*, 852 P.2d 44, 58–59 (Haw. 1993).

status for gays and lesbians.<sup>128</sup>

Outsider theory has been willing to explore quite usefully the role of sexuality in shaping the identity of gays and lesbians.<sup>129</sup> However, when an unsympathetic majority bases distinctions on sexuality, those inquiries tend to focus on sexual practices and they are typically used as a means for quarantine and condemnation. This was the definitional logic of the Court in *Bowers v. Hardwick*,<sup>130</sup> when it upheld Georgia's right to criminalize sodomy, implicitly assuming either that sodomy was exclusively a homosexual practice or that homosexual sodomy was exclusively criminalized. The *Bowers* Court refused to draw on the line of procreation and privacy cases because it found "[n]o connection between family . . . and homosexual activity."<sup>131</sup> Homosexual identity and homosexual relationships were reduced to "acts of . . . sodomy," devoid of love or intimacy (let alone affection, fidelity, or commitment).<sup>132</sup>

The congressional classifications underlying the military's "don't ask, don't tell" policy suffered from the same majoritarian preoccupation with the sexual activities of gay and lesbian servicemembers. The National Defense Authorization Act defined those who may be terminated from the military based on either their marriage or "attempt[ ] to marry a person known to be of the same biological sex." Furthermore, under the Act, a service member also may be terminated if he or she has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act," or (2) "stated that he or she is a homosexual or bisexual, . . . unless . . . the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."<sup>133</sup> Plaintiffs challenging military discharges have argued that a distinction exists between the status of

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<sup>128</sup> Of course the point of suspect class status is to eliminate governmental use of the disfavored classification and hence to more fully integrate those groups previously excluded by the classification.

<sup>129</sup> See generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983); LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* (1991); FOUCAULT, *supra* note 66; EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* (1994); ROBERT A. PADGUG, *PASSION AND POWER: SEXUALITY IN HISTORY* 14 (Kathy Peiss et al. eds., 1989); RITCH C. SAVIN-WILLIAMS, *GAY AND LESBIAN YOUTH: EXPRESSIONS OF IDENTITY* (1990); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

<sup>130</sup> 478 U.S. 186 (1986).

<sup>131</sup> *Id.* at 191.

<sup>132</sup> See *id.* at 192; see also Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 180 (1999).

<sup>133</sup> 10 U.S.C. § 654(b)(1)-(2) (West 1994).

one's sexual orientation and the conduct of engaging in prohibited acts.<sup>134</sup> The technique had been successful in some high visibility cases that challenged the previous military ban on homosexuals.<sup>135</sup> But it was a strategy with the enormous cost of distorting the lived experiences of and denying the importance of intimate relationships to gay and lesbian service members. "These plaintiffs present themselves as people who have never had an intimate relationship in the past, who will never have an intimate relationship in the future as long as they serve, and who will never even have a propensity to have an intimate relationship as long as they serve."<sup>136</sup> Bordering on the "factually absurd," as Diane Mazur has argued, "it just encourages the search for conduct."<sup>137</sup>

Arguments regarding the status or conduct distinction, while a valiant effort to show discrimination based on group belonging, unfortunately did not have the desired effect.<sup>138</sup> Courts misunderstood the class construction implications of the argument and instead insisted on defining homosexuals by conduct, targeting their attention to sexual practices.<sup>139</sup> Once group belonging is defined solely by physical acts (particularly sexual acts of a group that is thought to violate gender norms), unrelated to human desires or community, it becomes easy to vilify the group.

This is not to suggest that outsider theory should self-censor for fear of

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<sup>134</sup> See, e.g., *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1134 (9th Cir. 1997) (plaintiffs argued that "it is not rational for the government to presume from statements regarding homosexual orientation that they will likely engage in homosexual conduct."); *Thomasson v. Perry*, 80 F.3d 915, 930 (4th Cir. 1996) (arguing that it is irrational to assume "that declared homosexuals possess a unique propensity to engage in homosexual acts").

<sup>135</sup> See Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 294 (1996) (noting that "[t]he intense effort on the part of some gay legal advocates to avoid the *Hardwick* trap by decoupling sexual orientation from sexual conduct leads to some Alice-in-Wonderland type claims, which might be amusing if the outcome of the effort were not so potentially destructive").

<sup>136</sup> Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 239 (1996).

<sup>137</sup> *Id.* at 235.

<sup>138</sup> See, e.g., *Holmes*, 124 F.3d at 1134 (discharged service members contended that "it is not rational for the government to presume from statements regarding homosexual orientation that they will likely engage in homosexual conduct.").

<sup>139</sup> See, e.g., *Thomasson*, 80 F.3d at 930 ("[T]he legislature was certainly entitled to presume that a service member who declares that he is gay has a propensity to engage in homosexual acts . . . . Thomasson did not demonstrate that he lacked a propensity to engage in homosexual acts."); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267 ("Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their *conduct* which identifies them as homosexual, bisexual, or heterosexual.").

misinterpretation. The point is simply the pragmatic observation that outsider theories may be ineffectual, at least in the short term—they will not cause unwilling majority group members to test their own assumptions. At worst, their points may be intentionally perverted.<sup>140</sup>

The outsider strategy has a dark side, not of its own making, but in its cultural reception. The dominant culture suffers from a willingness to believe the stories of perversity about homosexuals: gays and lesbians are hypersexual, promiscuous, and predatory.<sup>141</sup> Any singular intemperate political action is assumed to be representative of all individuals in the group.<sup>142</sup> For traditionalists, even theoretical discussions of sexuality and sexual identity fed beliefs that homosexuals were being inappropriately sexual in public.<sup>143</sup>

Outsider theory was theoretically productive, attacking the objectivity and exposing the assumptions of the dominant culture, while formal equality theory attained more judicial and legislative successes. Yet neither theory has been consistently successful: The formal equality model played into traditionalism,

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<sup>140</sup> See Larry Catá Backer, *By Hook or by Crook: Conformity, Assimilation and Liberal and Conservative Poor Relief Theory*, 7 HASTINGS WOMEN'S L.J. 391 (1996).

Marginalized by dominant culture, consigned to the zoo of exotic (but dangerous) endeavors, transformative *critical* (outsider) theory at times best serves the very members of the dominant culture which this theory seeks to recast. Critical theory can be the dominant culture's theoretical bogeymen. It assumes its greatest social utility as fairy stories evoking images of the evil (witches, goblins, little people, spirits, deformities—you choose) which live in the dark, apocryphal forest just outside the safe clearing of current dominant norms. These are the kind of stories used by a dominant culture to reinforce its cultural norms.

*Id.* at 433.

<sup>141</sup> See Mary E. Becker, *The Abuse Excuse and Patriarchal Narratives*, 92 NW. U. L. REV. 1459, 1478 (1998) ("Gay men are particularly disgusting; because of their perverse sexual natures, they are essentially sexual and immoral and quite likely to abuse children . . . . Lesbians are also perverse, immoral, and hypersexual; allegations that they abuse children are also quite credible though unsupported by evidence."); see also, e.g., *State v. Walsh*, 713 S.W.2d 508, 512–13 (Mo. 1986) (referring to "the general promiscuity characteristic of the homosexual lifestyle" as supporting the legislative enactment of a deviate sexual intercourse law).

<sup>142</sup> See Hastings Wyman, Jr., *When Values Clash*, WASH. POST, June 2, 1997, at X08 (describing the "Religious Right strategy of citing examples of gay extremism—e.g., the Lesbian Avengers wearing 'We Recruit' T-shirts to a public school—to demonstrate that homosexuals prey on children").

<sup>143</sup> See, e.g., Roger Kimball, *What Next, a Doctorate of Depravity?*, WALL ST. J., May 5, 1998, at A22 (describing queer theory as "a mixture of deconstruction and Marxism: that is, hermetic gobbledygook and radical political enmity" and "an effort to make one's private sexual interests the chief focus of one's academic work").

while the outsider strategy was twisted to support preexisting beliefs that sexual others are dangerously different. While not all theorists are on one side and all activists and litigators on the other, the divide widens between liberationist academics stressing outsider theories and gay rights litigators and lobbyists fighting in the trenches with the weapons of formal equality.<sup>144</sup>

#### IV. MOVING BEYOND FORMAL EQUALITY

This Part asks in what ways gay legal theory can represent gay, lesbian, bisexual, and transsexual relations that will change the broader cultural discourse about sexual others. Any theory that advocates a re-presentation of the lives of sexual minorities needs to avoid the dangers of formal equality theory and the possible, perhaps probable, misinterpretations of outsider theory. Is there a potential coherent theory that can tap the transformative possibilities of outsider theory and the pragmatic successes of equality theory without contributing to retrenchment?

This Part begins by looking for common threads in successful sexual orientation cases. A common theme in cases that have moved us toward greater inclusion in the culture's most sacred institutions—adoption, marriage, the workplace, and the military—is the use of litigation strategies and lobbying efforts that emphasize shared humanity. Some courts are reaching healthy results by, often unconsciously, adopting that focus. Some of the cases discussed in this Part are equal protection cases, others use substantive due process arguments, but the strategy they share is the fundamental recognition that human beings are equal in worth. In short, many of these cases look at what makes us the same,

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<sup>144</sup> See *supra* text accompanying notes 57–72, and *infra* text accompanying notes 274–75. Interview with Anthony E. Varona, General Counsel and Legal Director of the Human Rights Campaign (July 23, 1999) (“One is often in the academic camp that doesn’t worry about political realities or in the camp that lives those political realities and worries about lobby-friendly arguments.”); Interview with Evan Wolfson, Marriage Project Director, Lambda Legal Defense & Education Fund (July 26, 1999) (“There is often a real disconnect between many academics and those of us working to persuade the not-yet-converted non-gay majority in the legislatures, law courts, and food courts. Gay rights advocates often find themselves confronted with a growing body of ‘scholarship’ making right-wing arguments, marshaling bogus evidence, or trying to poke holes in and raise doubts about the arguments and evidence we put forward, without much assistance from gay and ‘friendly’ scholars on our side in meeting those attacks or assuaging the concerns of judges and legislators.”). Some gay legal theorists, though, demonstrate keen sensitivity to the cultural and political reception of theory arguments. See, e.g., WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 227–318 (1997); Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155 (1997); Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485 (1998).



rather than what makes us different.

But the sameness in these cases is not the sameness of equality theory. It does not begin with a comparison of homosexuals and heterosexuals or question whether homosexuals measure up. Instead, the successful litigation and legislative strategies emphasize shared humanity irrespective of sexual orientation: not what makes gays the same as straights, but what are good qualities that make straights and gays alike as people.<sup>145</sup>

The second section of this Part builds on the common humanity cases, as well as writings in anthropology, sociology, and philosophy, to develop a jurisprudential theory of shared humanity. While the humanist theory is applied here specifically in the context of decisions about sexual minorities, it can guide thinking to shape both the discourse and decisional practices with respect to other oppressed groups.

### A. Cases Emphasizing Our Common Humanity

A number of cases across the country, at various levels, both state and federal, particularly in the past half decade, have acknowledged the fundamental humanity of sexual minorities. These cases range from political participation to adoption, retention of rent-controlled apartments to military service; but they all partake of a vision of sexual others as people of competence, people with deep familial relations, people deserving of love and respect and civil belonging, as part of a human community.

*Romer v. Evans*<sup>146</sup> was a momentous Supreme Court decision in this regard. In *Romer*, the Court invalidated a voter referendum that prohibited the passage or enforcement of any laws protecting against discrimination on the basis of sexual orientation. The Court tackled the antigay initiative head-on, stating explicitly that animosity toward gays and lesbians is not a legitimate state interest.<sup>147</sup> *Romer* was the first time the Supreme Court sustained a discrimination claim by

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<sup>145</sup> Since "good" is not a term with universal meaning, identifying the good is, in the end, a moral exercise. An emerging debate in gay legal theory is whether sexual outsiders should engage in moral argumentation or whether this form of argument legitimizes antigay morality rhetoric. See, e.g., Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 266–68; Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 854 (1997). As I detail later, *infra* text accompanying note 227, since moral arguments should turn on reason and the accumulation of empirical evidence across disciplines and cultures (rather than, say, religion), moral arguments are imperative, as is defining criteria for distinguishing among them.

<sup>146</sup> 517 U.S. 620 (1996).

<sup>147</sup> *Id.* at 634.

homosexuals.<sup>148</sup>

Why did *Romer* work? Why was the Court willing to give the rational basis test some bite? One answer may be a matter of constitutional theory: if hatred—the “bare . . . desire to harm a politically unpopular group”<sup>149</sup>—is a legitimate government purpose, it is difficult to imagine any purported government reason that would ever fail the rational basis test.<sup>150</sup>

Another answer may be that we are seeing the gradual enfranchisement of an underclass group that parallels the historical process of rights-conferral on other disempowered groups in this country. The rights-garnering patterns of other minority groups show that first, legal rights (to sue or enter contracts) are attained, political enfranchisement follows (the rights to vote, hold office, or serve on juries),<sup>151</sup> and only later, when constructions of deviance and subordination are shorn away, do “rights” of social participation follow.

For women the Married Women’s Property Acts of the 1840s and voting rights in 1920 presaged later triumphs in the areas of education, employment, and reproductive rights.<sup>152</sup> For members of racial and ethnic minorities, legal and franchise rights came close together. Some rights in the social arena came early, while others, such as the formal right to equal educational opportunities and the right to intermarry came later.<sup>153</sup> Of course, exclusionary social practices in employment, housing, and education are still being litigated today.<sup>154</sup>

Legal rights (to sue, enter contracts, and inherit property from other than a same sex partner) have long been available to sexual minorities, principally because this facet of identity is one that, for the most part, is not visible. Political enfranchisement has been the next step. *Romer* and the range of cases supporting First Amendment rights for gay and lesbian student groups<sup>155</sup> may indicate the

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<sup>148</sup> See Louis Michael Seidman, *Romer’s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 68 n.3.

<sup>149</sup> *Id.* (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>150</sup> See Roger Craig Green, Note, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 448 n.32 (1998).

<sup>151</sup> See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1024 (1995); Louisa S. Ruffine, *Civil Rights and Suffrage: Myra Bradwell’s Struggle for the Equal Citizenship for Women*, 4 HASTINGS WOMEN’S L.J. 175, 177–78 (1993).

<sup>152</sup> See generally Richard H. Chused, *Married Women’s Property Law: 1800–1850*, 71 GEO. L.J. 1359 (1983); Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994).

<sup>153</sup> See ROBERT L. HAYMAN, JR., *THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW* 61–90 (1998).

<sup>154</sup> See Evelyn Nieves, *Civil Rights Groups Suing Berkeley over Admissions Policy*, N.Y. TIMES, Feb. 3, 1999, at A9.

<sup>155</sup> See *infra* text accompanying notes 175–76.

historic pattern of rights-conferral.

But perhaps *Romer* can be read more generously. Perhaps it indicates the Court's willingness to acknowledge the fundamental humanity of homosexuals, and to bring them within the protection of the anticaste principle—that a state cannot create an electoral underclass.<sup>156</sup> Justice Kennedy began his opinion in *Romer* by recounting the admonition of the first Justice Harlan in *Plessy v. Ferguson*, that “the Constitution ‘neither knows nor tolerates classes among citizens.’”<sup>157</sup> Later in the opinion, the Court recognized the isolationism caused by Amendment 2: “the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”<sup>158</sup>

In this more generous reading of *Romer*, the majority's silence regarding *Hardwick* predicts its eclipse.<sup>159</sup> The Court's denial of certiorari in *Equality Foundation*<sup>160</sup> then might suggest the Court's expectation that if a group loses in the political process, it is a one-time loss, not a complete bar to access. Or, viewed more benignly still, perhaps the Court's denial of certiorari says nothing about the Supreme Court's view of the merits. In any event, the certiorari denial in *Equality Foundation* and silence in *Romer* regarding the precedential force of *Hardwick* both indicate that any principle of humanity the Court is acknowledging is fledgling at best.

But if *Romer* does embody the anticaste principle, it becomes a recognition of universal rights.<sup>161</sup> In the hierarchy of constitutional rights, *Romer* dealt with

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<sup>156</sup> See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2441 (1994); see also West, *supra* note 92, at 1319.

These wondrous moments, these sudden and dramatic and inclusive acts, which simultaneously expand the reach of the political community by acknowledging the commonality of the human community, are rare, but they do occur, and when they occur, they are precious. The importance, the beauty, and the wonder of the Supreme Court's decision in *Romer*, lie in the fact that it was just such a moment.

*Id.*

<sup>157</sup> *Romer v. Evans*, 517 U.S. 620, 623 (1996) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion)).

<sup>158</sup> *Id.* at 631.

<sup>159</sup> See Tobias Barrington Wolff, Note, *Principled Silence*, 106 YALE L.J. 247, 252 (1996).

<sup>160</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 298 (6th Cir. 1997).

<sup>161</sup> *Romer*, 517 U.S. at 633 (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”).

one that was close to sacrosanct: the right to participate in the democratic process. This right to partake in civic life was both fundamental and enjoyed by all people: "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."<sup>162</sup> In emphasizing the shared right to political participation, the Court recognized the citizenship and the need for political belonging of sexual outsiders. In the Court's words, a state cannot make [gay and lesbian people] "unequal to everyone else . . . . A State cannot so deem a class of persons a stranger to its laws."<sup>163</sup> Given the Court's unwillingness to add new suspect or quasi-suspects classes, shared humanity theory may prove more fruitful in affecting the Court's reasoning regarding the other equal protection strand, fundamental rights analysis.

The shared humanity idea also manifests in discriminatory treatment cases, such as *Nabozny v. Podlesny*.<sup>164</sup> For years Jamie Nabozny was harassed and physically abused by fellow students during his middle and high school years. They struck him, spit on him, called him a faggot, shoved him to the floor, pushed him so forcefully he fell into a urinal, and "performed a mock rape on [him]" while a group of "twenty other students looked on and laughed."<sup>165</sup> He was beaten and kicked so severely he collapsed with internal bleeding. As a result of the abuse, Jamie attempted suicide twice. The school official in charge of discipline "laughed and told Nabozny that [he] deserved this treatment because he is gay."<sup>166</sup> The principal also told him that if he was going to be "openly gay," he should expect this sort of abuse. Despite repeated requests for help and despite a school policy of investigating and disciplining cases of assault and sexual harassment, the administrators "turned a deaf ear" on Nabozny's pleas for help and, indeed, "mocked [his] predicament."<sup>167</sup>

The panel of the Seventh Circuit Court of Appeals held that Nabozny stated an equal protection claim for purposeful discrimination and deliberate indifference of school officials based on both gender and sexual orientation.

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<sup>162</sup> *Id.* at 631.

<sup>163</sup> *Id.* at 635. "[P]laintiffs argued that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment, as well as other state and federal constitutional provisions, by consigning 'gay men, lesbians and bisexuals to a second class citizenship.'" Stephanie L. Grauerholz, Comment, *Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841, 845 (1995) (citing the complaint).

<sup>164</sup> 92 F.3d 446 (7th Cir. 1996).

<sup>165</sup> *Id.* at 451.

<sup>166</sup> *Id.* at 452.

<sup>167</sup> *Id.* at 449.

Although Wisconsin had a state statute protecting students from discrimination based on sex and sexual orientation, the court specifically said it was not relying on the statute.<sup>168</sup> Importantly, *Nabozny* represents the first federal appellate decision acknowledging that discrimination based on sexual orientation is sex discrimination.<sup>169</sup>

*Nabozny* is more than a breakthrough in equal protection jurisprudence. The *Nabozny* court was not only sensitive to gender stereotyping,<sup>170</sup> it comprehended human vulnerability. Devoting a substantial amount of time to detailing the treatment Jamie suffered at the hands of his peers and school officials,<sup>171</sup> the *Nabozny* court recognized the lived experiences of being gay, and being "treated differently from other students."<sup>172</sup>

On remand, a jury issued a liability verdict in favor of Jamie, and the school district ultimately settled the case for \$900,000.<sup>173</sup>

It might also be argued that this humanist analysis ignores the legalistic core of *Romer*. Perhaps *Romer* is not so symbolically significant. Maybe it is just the minimalist reaction of a conservative Court to an overreaching statute. Skeptics might also argue that *Romer* and *Nabozny* are not really about sameness or respect for humanity. Perhaps these are cases at the fringe in which compellingly horrific facts made good law. Maybe they really reflect revulsion at the extremes of subordination, and only when subordination goes so far as to be inexplicable, does the mainstream revolt. Colorado's Amendment 2 was the hate-motivated political equivalent of the racial internment cases. School administrators in *Nabozny* were more than unresponsive, they were complicit in the face of extreme physical abuse. This reading of *Romer* and *Nabozny* would see courts as condemning only extremist behavior but not actually respecting common features of humanity. Viewed this way, *Romer* and *Nabozny* stand for revulsion at the defendants' behavior rather than respect for the plaintiffs' humanity. Can we count on courts to truly understand when it comes to core human attributes and desires in less egregious circumstances?

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<sup>168</sup> See *id.* at 457 n.11.

<sup>169</sup> *Id.* at 458.

<sup>170</sup> See *id.* at 455–56 (interpreting *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), as making clear that schools "may not discriminate in their protection of men and women based on a stereotype of feminine weakness or inferiority").

<sup>171</sup> See *id.* at 451–53. For a superb example of briefing, in which Jamie Nabozny's attorneys detailed the horrors he experienced year by year, in each grade from seventh through eleventh, see Patricia M. Logue & David S. Buckel, *Fighting Anti-Gay Abuse in Schools: The Opening Appellate Brief of Plaintiff Jamie Nabozny in Nabozny v. Podlesny*, 4 MICH. J. GENDER & L. 425, 429–41 (1997).

<sup>172</sup> *Nabozny*, 92 F.3d at 454.

<sup>173</sup> See *\$900,000 Won by Gay Man in Abuse Case*, N.Y. TIMES, Nov. 21, 1996, at B11.

Some language in the opinions indicates that the courts actually were concerned with the core humanity of the plaintiffs.<sup>174</sup> Even if *Romer* and *Nabozny* are reactions to the extremes, they still can be seen as progress. Most importantly, *Romer* and *Nabozny* are not isolated cases. They are part of a small but growing number of cases attesting to the common humanity of all people that transcends differences of culture, politics, and identity.

The humanization principle can be seen in the First Amendment cases regarding gay and lesbian student groups. Despite the precedents that high school students generally have fewer rights than other groups of citizens, these cases virtually uniformly uphold the rights of lesbian, gay, bisexual, and transsexual student groups to recognition and funding.<sup>175</sup> Perhaps these cases are purely victories of formal equality—commanding that institutions must recognize or fund all groups meeting neutral criteria.<sup>176</sup> The language in these cases is also heavily laced with traditional First Amendment rhetoric regarding viewpoint restriction, but it does contain nuggets which suggest that sexual minorities are entitled to an undifferentiated status: They are people who must be included in the community of political equals, people who are worthy of being heard irrespective of their group identity.<sup>177</sup>

One aspect of humanization that has received somewhat less attention than others is the increasing recognition by courts and legislatures of the importance

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<sup>174</sup> See *Romer v. Evans*, 517 U.S. 620, 623 (1996) (stating that law requires “a commitment to . . . neutrality where the rights of persons are at stake”); *Nabozny*, 92 F.3d at 451–52 (describing Jamie’s childhood, pre-adolescence, and teenage years); *id.* at 454 (discussing differential treatment experienced by Jamie compared to other students). Compare *Romer*, 517 U.S. at 630 (incorporating comfortably the terms “gays and lesbians”) with *Bowers v. Hardwick*, 478 U.S. 186 (1986) (never once using the terms). See also *supra* text accompanying notes 157–58, 162.

<sup>175</sup> See *Gay & Lesbian Students Ass’n v. Gohn*, 850 F.2d 361 (8th Cir. 1988); *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984); *Gay Lib v. Univ. of Mo.*, 558 F.2d 848 (8th Cir. 1977); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Gay Students Org. Univ. N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Student Coalition for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972); *Department of Educ. v. Lewis*, 416 So. 2d 455 (Fla. 1982).

<sup>176</sup> In response, the school board in Utah eliminated all extracurricular student groups in order to get rid of the Gay-Straight Alliance. *Club Ban Aimed at Gays Hurting Other Students*, DES MOINES REG., Dec. 6, 1998, at 8A.

<sup>177</sup> See, e.g., *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548, 1554 n.41 (M.D. Ala. 1996) (noting in response to defendant’s justification for refusing to fund LGB group because that would promote a “homosexual lifestyle” prohibited by the state’s sodomy laws: “There is nothing before the court, and the court is not otherwise aware of any study or evidence, that would indicate that homosexual people manifest any different range of lifestyles from that of heterosexual people.”), *aff’d*, 110 F.3d 1543 (11th Cir. 1997).

of sexual intimacy between consenting adults. Despite the Supreme Court's refusal in *Bowers v. Hardwick*<sup>178</sup> to extend privacy protection to homosexual intimacy, in the thirteen years since *Hardwick* a number of state legislatures have decriminalized sodomy, and several state courts have interpreted state constitutions to protect private, consensual sexual activity.<sup>179</sup> In November of 1998, in *Powell v. State*,<sup>180</sup> the Georgia Supreme Court held the very sodomy statute at issue in *Hardwick* unconstitutional under Georgia Constitution's due process clause. Although the facts in *Powell* were perhaps less than ideal for the principle—a charge of aggravated (nonconsensual) sodomy by an uncle upon his wife's 17-year-old niece and a conviction on the lesser offense of consensual sodomy—the court's language was sweeping in its recognition of “the right of privacy guaranteed all Georgia citizens . . . .”<sup>181</sup> “We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity.”<sup>182</sup> Similarly, the Kentucky and Montana Supreme Courts and the Tennessee Court of Appeals have struck as unconstitutional sodomy statutes that infringed on consensual, noncommercial same sex activity.<sup>183</sup> The right to intimate sexual activity was a right of “adults,” not any particular group. The courts' articulation of this right demonstrates a recognition of similar needs among all people for privacy with respect to their sexual intimacy.<sup>184</sup>

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<sup>178</sup> 478 U.S. 186, 190 (1986) (holding that the Constitution does not “extend a fundamental right to homosexuals to engage in acts of consensual sodomy”).

<sup>179</sup> See William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 VAND. L. REV. 419, 432 (1997) (“It is fair to say that no reported state court decision since *Bowers* has applied a state sodomy law to private consensual intimacy between two adults of the same sex.”).

<sup>180</sup> 510 S.E.2d 18 (Ga. 1998).

<sup>181</sup> *Id.* at 21.

<sup>182</sup> *Id.* at 24 (citation omitted).

<sup>183</sup> See *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); see also *Campbell v. Sundquist*, 926 S.W.2d 250, 263 (Tenn. Ct. App. 1996) (“We think there is little doubt that the State's attempt to rescue homosexuals from a socially unpopular lifestyle does not provide a compelling reason or even a valid reason for infringement of the fundamental right of adults to engage in private, noncommercial, consensual sex.”); *State v. Morales*, 826 S.W.2d 201, 203–05 (Tex. Ct. App. 1992) (finding unconstitutional Texas statute criminalizing private same-sex sexual relations between consenting adults).

<sup>184</sup> *Gryczan*, 942 P.2d at 122.

This strategy of crafting a legal representation that promoted our common humanity was successful in *Braschi v. Stahl Associates Co.*<sup>185</sup> in which the New York Court of Appeals held that the life partner of a deceased tenant was a "family member" for purposes of a New York rent-control succession law. The court defined the term "family" to include homosexual couples whose relationship was a long-term emotional commitment, and who were economically and socially interdependent. As with *Nabzony*, success on a shared humanity theory in *Braschi* comes in a statutory interpretation case, indicating that the theory may prove most fruitful in influencing the humanist expansion of terms in statutes rather than in creating sweeping constitutional rights by reshaping interpretation of the equal protection clause.

*Braschi* was a landmark decision in its recognition of nontraditional families. The court defined "family," in part, as "'a group of people united by certain convictions or common affiliation' . . ."<sup>186</sup> By determining that "those who reside in households having all of the normal familial characteristics" are a family, the court distinguished familial relationships from the situations of "mere roommates" or groups with "superficial" connections but related by blood or law.<sup>187</sup> The court enumerated a variety of factors that characterize family relationships: "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."<sup>188</sup> The court gave principal importance to the "expectations of individuals who live in such nuclear units," and referred to several cases giving official recognition to other nontraditional family units, such as an orphan who was never formally adopted but who lived in the family home for 34 years, "two men living in a 'father-son' relationship" for a quarter of a century, and heterosexual life partners.<sup>189</sup>

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Quite simply, consenting adults expect that neither the state nor their neighbors will be co-habitants of their bedrooms. Moreover, while society may not approve of the sexual practices of homosexuals, or, for that matter, sodomy, oral intercourse or other sexual conduct between husband and wife or between other heterosexuals, that is not to say that society is unwilling to recognize that all adults, regardless of gender or marital state, at least have a reasonable expectation that their sexual activities will remain personal and private.

*Id.*

<sup>185</sup> 543 N.E.2d 49 (N.Y. 1989).

<sup>186</sup> *Id.* at 54 (citation omitted) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 448 (1984)).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 55 (citation omitted).

<sup>189</sup> *Id.* at 54, 55 (citation omitted).



*Braschi* does a wonderful job of demonstrating that there is an independent, human-centered (i.e. nonheterocentric) way of recognizing the significance of certain types of relationships that share important characteristics—both for the participants and for society. Long term commitment (even if it sometimes fails), unit decision making, and willingness to care for others in “sickness and health” (What better example do we have than some of the histories of gay men caring for partners dying of AIDS?<sup>190</sup>) are all valuable attributes for any group of human beings.

Some, perhaps most, courts have been limited in their extension of *Braschi*, rigidly applying the list of family characteristics to exclude some couples or relationships from familial benefits, such as survivor’s statutory shares.<sup>191</sup> Relationships of shorter duration or fewer than all the formalities have had difficulty gaining recognition.<sup>192</sup> Yet *Braschi* has encouraged the official acknowledgement of nontraditional family arrangements in various contexts.<sup>193</sup>

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<sup>190</sup> See generally STEVEN DIETZ, *LONELY PLANET* (1994).

<sup>191</sup> See, e.g., Court Decisions, *Raum v. Restaurant Assoc., Inc.*, N.Y.L.J., July 13, 1998, at 26 (denying homosexual partners the right to bring wrongful death actions); see also *Secord v. Fischetti*, 653 N.Y.S.2d 551, 552 (N.Y. App. Div. 1997) (upholding administrative determination that life partners were not surviving “spouses” for purposes of crime victims compensation); *In re Cooper*, 592 N.Y.S.2d 797, 798–99 (N.Y. App. Div. 1993) (refusing to allow a homosexual partner to be considered a surviving “spouse” for purposes of intestate succession).

<sup>192</sup> See, e.g., *GSL Enter., Inc. v. Lopez*, 656 N.Y.S.2d 637, 638 (N.Y. App. Div. 1997) (finding no familial connection in eleven year relationship where parties shared expenses, vacationed together, and had some joint credit cards); Court Decisions, 54 *Featherco, Inc. v. Correa*, N.Y.L.J., July 30, 1997, at 21 (refusing to grant rent control succession rights where lesbian couple had 13 year relationship because of a lack of documentation of intermingled finances or expenses or any formalized legal obligations); see also Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a “Simulacrum of Marriage,”* 66 *FORDHAM L. REV.* 1699, 1754 n.341 (1998) (referring to an unreported New York case in which a same sex couple failed the *Braschi* test “because the deceased partner did not leave a will or name his partner as an insurance policy beneficiary”); Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 *VA. L. REV.* 1643, 1664–65 (1993) (suggesting that the *Braschi* court actually required “rather conservative things” of the partners in that case).

<sup>193</sup> See, e.g., *Reep v. Commissioner of the Dep’t. of Employment & Training*, 593 N.E.2d 1297, 1300–01 (Mass. 1992) (using *Braschi* to find an unmarried heterosexual partner may be eligible for unemployment compensation benefits when leaving employment to relocate with partner); Court Decisions, *Slattery v. City of New York*, N.Y.L.J., Feb. 11, 1999, at 28–29 (relying on *Braschi* to uphold New York City’s domestic partners law); Court Decisions, *Colon v. Frias*, N.Y.L.J., July 8, 1994, at 31 (finding that two women who had lived in a nonsexual relationship as sisters for 34 years were family members for purposes of rent control succession, despite separate finances).

Four months after *Braschi*, the Eastern Paralyzed Veteran’s Association was able to use

More generally, *Braschi* and other cases truly contemplating the meaning of families advanced the expansion of society's definition of "family": familial relationships are coming to be understood in emotional and functional terms, such as love, care, commitment, and economic dependency, rather than in legal or structural terms.<sup>194</sup>

This same theme characterizes gay stranger and second parent adoption cases. A small but growing number of jurisdictions are willing to allow adoption by gays and lesbians.<sup>195</sup> Although courts historically used and some presently

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the decision to successfully advocate with the New York State Division of Housing and Community Renewal that disabled veterans who "lived in family arrangements with other veterans with whom they bonded emotionally and shared services and expenses" were family for rent stabilization purposes. Lynn M. Kelly, *Lawyering for Poor Communities on the Cusp of the Next Century*, 25 FORDHAM URB. L.J. 721, 724 (1998). *Braschi* also prompted an amendment of the rent and eviction regulations and the rent stabilization code that enlarged the definition of protected family members for rent control and rent stabilization purposes. See *Rent Stabilization Ass'n v. Higgins*, 630 N.E.2d 626, 629 (N.Y. 1993) (upholding the regulations); see also *In re Guardianship of Kowalski*, 478 N.W.2d 790, 797 (Minn. Ct. App. 1991) (finding that a lesbian should be named legal guardian of her partner); *Stewart v. Schwartz Brothers-Jeffers Memorial Chapel, Inc.*, 606 N.Y.S.2d 965, 968-69 (N.Y. Sup. Ct. 1993) (finding that, although now moot, gay companion in "close spousal-like relationship" could make burial arrangements for deceased partner); *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 200 (N.Y. App. Div. 1982) (allowing adult adoption to serve "as a legal mechanism for achieving economic, political and social objectives rather than the stereotype parent-child relationship").

<sup>194</sup> See Michael H. v. Gerald D., 491 U.S. 110, 137-41 (1989) (Brennan, J., dissenting); Paris R. Baldacci, *Pushing the Law to Encompass the Reality of Our Families: Protecting Lesbian and Gay Families from Eviction from Their Homes—Braschi's Functional Definition of "Family" and Beyond*, 21 FORDHAM URB. L.J. 973, 977 (1994); Shoshana Bricklin, *Legislative Approaches to Support Family Diversity*, 7 TEMP. POL. & CIV. RTS. L. REV. 379, 379 (1998).

<sup>195</sup> Only one state statutorily prohibits gays and lesbians from adopting. See FLA. STAT. ANN. § 63.042(3) (West 1997). Twelve states and the District of Columbia have allowed gay or lesbian stranger or second parent adoption. See *In re M.M.D.*, 662 A.2d 837, 857 (D.C. 1995); *In re K.M.*, 653 N.E.2d 888, 894 (Ill. App. Ct. 1995); *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993); *In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 554-55 (N.J. Super. Ct. Ch. Div. 1993); *In re Adoption of Evan*, 583 N.Y.S.2d 997, 1001-02 (N.Y. Sur. Ct. 1992); *In re Adoption of Charles B.*, 552 N.E.2d 884, 890 (Ohio 1990); *Adoption of B.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993); Christensen, *supra* note 192, at 1767 n.417 (citing lower court decisions from Alaska, California, Indiana, Oregon, Pennsylvania, and Washington). Decisions in a number of other states have foreclosed gay stranger or coparent adoptions. See *In re Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830 (Ariz. Ct. App. 1986); *In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. Ct. App. 1996); *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994); see also *Kulla v McNulty*, 472 N.W.2d 175 (Minn. Ct. App. 1991) (denying visitation). Even within a jurisdiction, courts reach contrary results. Compare *In re Adoption of Evan*, 583 N.Y.S.2d at 997 (allowing mother's partner to adopt child so that he could be raised

still use a parent's status as a sexual other to deny custody or visitation, these cases may be diminishing.<sup>196</sup> When people in committed relationships seek to expand their family through adoption or second parent adoption, a number of courts have endorsed the idea that these families will provide a loving, nurturing home life for a child.<sup>197</sup>

*Braschi* and other cases that value nontraditional intimate relations<sup>198</sup> go beyond simple comparisons of heterosexual and homosexual unions. What they recognize are those characteristics that are common to families and the value of families of choice. These successful efforts to define families in emotional terms, as opposed to legal terms, indicates a shift in focus toward recognizing the importance of human emotional commitment. Families are groups unified not by formal legal events but by love, care, and interdependence.

In a variety of domains, courts are beginning to acknowledge basic human needs and characteristics shared by all people—needs for intimacy, familial belonging, expression, security, bodily integrity, and civic participation, to name but a few. This resonates with modern philosophical and anthropological writings that argue persuasively that humans across cultures have similar senses, needs, capabilities, qualities, characteristics, and desires, which can be identified

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by both parents), *with In re Dana*, 624 N.Y.S.2d 634, 636–37 (N.Y. App. Div. 1995) (refusing to allow natural mother's female life partner to adopt child even though mother consented).

<sup>196</sup> See William E. Adams, Jr., *Whose Family Is It Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 580 (1996); Karen Markey, Note, *An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS. 721 (1998). *But see Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (allowing change in custody from mother to father based on father's new marriage and change in mother's relationship from "discreet" to open lesbian relationship in which the partners "kiss and show romantic affection for each other in the child's presence"); *Thigpen v. Carpenter*, 730 S.W.2d 510, 512 (Ark. Ct. App. 1987); *Phillips v. Phillips*, No. CA94-03-005, 1995 WL 115426, at \*3 (Ohio Ct. App. Mar. 20, 1995) (finding an abuse of discretion by trial court that gave a lesbian mother physical custody of her children).

<sup>197</sup> See, e.g., *In re Adoption of Evan*, 583 N.Y.S.2d at 998–99 (stating that second parent adoption by lesbian mother would afford six year old son important economic and legal rights, to inheritance, social security, medical, and educational benefits, and most importantly, emotional benefits and "additional security conferred by formal recognition in an organized society.").

<sup>198</sup> See, e.g., *Angelilli v. Conshohocken*, No. CIV.A.96-33a1, 1996 WL 663871, at \*2–\*3 (E.D. Pa. Nov. 15, 1996) (allowing a heterosexual woman, fired for having an adulterous relationship with her supervisor, to sue under title VII and section 1983, and finding that this "love relationship" with the partners cohabiting, although adulterous, could rise to the level of a constitutionally "protected intimate association," although more facts needed to be developed regarding the length, nature, exclusivity, and the degree of commitment in the relationship).

through reason.<sup>199</sup> Yet human nature is not fixed and personhood is, in important ways, a relational construct.<sup>200</sup> Numerous writers, in disciplines ranging from philosophy to sociology to law, are coming to understand that human nature can be both universal—with many qualities shared across time and cultures—and contingent—with characteristics forged by various social influences.<sup>201</sup> Without

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<sup>199</sup> See, e.g., MELVILLE J. HERSKOVITS, *MAN AND HIS WORKS: THE SCIENCE OF CULTURAL ANTHROPOLOGY* 76 (1948) ("To say that there is no absolute criterion of value or morals . . . does not mean that such criteria, in differing forms, do not comprise universals in human culture. . . . certain values in human life are everywhere accorded recognition, even though the institutions of no two cultures are identical in form. Morality is a universal, and so is enjoyment of beauty, even some standard of truth."); JAMES LETT, *SCIENCE, REASON, AND ANTHROPOLOGY: THE PRINCIPLES OF RATIONAL INQUIRY* 129 (1997) (arguing that shared features across cultures—that all humans use language, classify each other according to status, role and kinship, display emotion, recognize time, understand logic, think causally and so on—indicate "a universal human nature"); CLAUDE LÉVI-STRAUSS, *MYTH AND MEANING* 19 (1979) (contending that "notwithstanding the cultural differences between the several parts of mankind, the human mind is everywhere one and the same . . ."); see also Ralph Linton, *Universal Ethical Principles: An Anthropological View*, in *MORAL PRINCIPLES OF ACTION: MAN'S ETHICAL IMPERATIVE* 645, 657 (Ruth Nanda Anshen ed. 1952); THOMAS NAGEL, *THE LAST WORD* (1997); Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in 13 *MIDWEST STUDIES IN PHILOSOPHY* 32 (Peter A. French et al. eds., 1988); MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW: A BICENTENNIAL ESSAY* 47–48 (1988); Louis Henkin, *The Universality of the Concept of Human Rights*, 506 *ANNALS AM. ACAD. POL. & SOC. SCI.* 15 (1989); Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 *YALE J.L. & HUMAN.* 197 (1994); Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 962–65 (1982) (offering various philosophical views of personhood and employing the traditional view of persons as rational, reflective beings).

<sup>200</sup> See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 56 (1996) (stating that "a better view of personhood should understand many kinds of particulars—one's politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes—as integral to the self.").

<sup>201</sup> See, e.g., MARVIN HARRIS, *OUR KIND: WHO WE ARE WHERE WE CAME FROM AND WHERE WE ARE GOING* 230 (1989) (explaining that an assumed biopsychological need to reproduce may instead be a need among primates across cultures for "close, affectionate, emotional relationships with supportive, concerned, trustworthy and approving beings"); ALFIE KOHN, *THE BRIGHTER SIDE OF HUMAN NATURE: ALTRUISM AND EMPATHY IN EVERYDAY LIFE* (1990) (rejecting a strong deterministic view of human nature, but culling data over time and in various cultures "to support the proposition that it is as 'natural' to help as it is to hurt, that concern for the well-being of others cannot be reduced to self-interest, that social structures predicated on human selfishness have no claim to inevitability"); see also Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 *YALE L.J.* 1533, 1554 (1994) (book review); Robert Justin Lipkin, *Kibbitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 *TUL. L. REV.* 69, 96 (1991). Sam Marcossan makes a similar point: that sexual orientation is a classification that is, at once, both immutable and socially constructed. Sam Marcossan, *Constructive Immutability*

dipping into sociobiological explanations,<sup>202</sup> and while withholding empirical judgment about human nature, we can still believe as a matter of social and political philosophy that it is wise to search for and respect shared human needs and desires.

Of course, societies construct circumstances in which people experience those shared needs, but are permitted to satisfy their common desires unequally, if at all.<sup>203</sup> Extreme relativists may disagree about the validity of claims to universal human nature, arguing that “[a]ny effort to establish such a universal perspective is essentialist, and likely also to be racist, ethnocentric, sexist or imperialist, failing to respect the ‘radical otherness’ of different groups and cultures.”<sup>204</sup> Yet recognizing shared needs does not deny differences of identity, the cultural construction of values, contextual variations in norms and understandings, or positional truths, “so long as they are grounded in the belief that there is a core of human personhood that must be acknowledged and respected.”<sup>205</sup>

### B. *Shared Humanity Theory*

This Section builds on the cases and philosophical writings concerning core commonalities among humans to construct a theory of shared humanity. It develops the humanist idea principally as jurisprudential theory because the cases that support the theory come from domains as diverse as adoption, child custody, military service, political access, and discrimination in schools. Shared humanity may also offer a way of re-envisioning constitutional doctrine in both the substantive due process and equal protection areas. This Section addresses the ways in which a theory of shared humanity differs from formal equality and outsider theory and may be a useful way of reconciling the tensions in gay legal theory.

A theory of shared humanity is based on phenomenology and empiricism; it is both humanist and rationalist in origin. It seeks to create respect for humans—

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(1999) (unpublished manuscript, on file with author). *But see* ADAM KUPER, *THE CHOSEN PRIMATE: HUMAN NATURE AND CULTURAL DIVERSITY* 229 (1994) (arguing that “[t]here is no simple, natural, universal primal constitution of human society”).

<sup>202</sup> See, e.g., EDWARD O. WILSON, *ON HUMAN NATURE* (1978).

<sup>203</sup> See Martha Nussbaum, *Narratives of Hierarchy: Loving v. Virginia and the Literary Imagination*, 17 QUINNIPIAC L. REV. 337, 344 (1997).

<sup>204</sup> Jane E. Larson, “*Imagine Her Satisfaction*”: *The Transformative Task of Feminist Tort Work*, 33 WASHBURN L.J. 56, 68 (1993).

<sup>205</sup> *Id.* at 67; see also Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765, 774 (1992) (espousing the ideals of progressivism in which individuals are “strengthened by caring communities that are both attentive to the shared human needs of its members and equally mindful of their diversity and differences”).

their shared needs, relationships, choices, and differences—and to promote prosocial values, such as compassion, love, and tolerance. The fundamental principles for shared humanity theory are: (1) the recognition of the equal worth of all people and their entitlement to equal dignity in treatment; (2) respect for identity differences; and (3) a commitment to reason as the method for deciding value conflicts.

### 1. *The Recognition of Equal Worth; the Entitlement to Equal Dignity*

The call for equal worth and dignity is made by communitarians, contractarians, liberals, and critical theorists alike.<sup>206</sup> It is implicit in the Constitution,<sup>207</sup> and explicit in the preamble to the United Nation's Universal Declaration of Human Rights.<sup>208</sup> Yet as Andrew Koppelman has pointed out, valuing the equal intrinsic dignity and worth of individuals, without inferring obligations of action, will not guarantee equal treatment. He notes as an example the Catholic Church's condemnation of homosexuality and, at the same time, professed respect for the equal dignity and worth of individual homosexuals.<sup>209</sup>

Fully recognizing the essential humanity of people implies several

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<sup>206</sup> See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 991–92 (1978) (maintaining that a “core truth of social contract doctrines” is that “the community must respect the dignity and equal worth of its members”); Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 108 (1995) (arguing for two core commitments: to a universal comprehension—of everyone's truths—and universalized compassion—for all people, in all circumstances); see also Martin Luther King, Jr., *The Ethical Demands for Integration*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., at 117, 119 (James Melvin Washington ed., 1986) (suggesting that the proclamation “All men . . . are created equal” supports the “dignity and worth of human personality”); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 353 (1992) (showing that “antidiscrimination values” underlying the Equal Protection Clause prohibit state actors “from acting on the basis of prejudicial or traditional habits of thought that deny the full humanity, individual worth, and dignity of members of particular groups”).

<sup>207</sup> See U.S. CONST. amend. V, amend. XIV, § 1.; cf. KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 94 (1989) (showing the important connection between voting and equal citizenship).

<sup>208</sup> G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 16, at 1, U.N. Doc. A/810 (1948) (unanimously adopted on December 10, 1948, by the United Nations General Assembly) (explaining that “the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women”).

<sup>209</sup> See Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 117 (1997).

prescriptions regarding the treatment of fellow humans. Shared humanity endorses both individual and communal worth, but also acknowledges the reality and cultural constructions attached to group-belonging. Thus, implicit in the theory of shared humanity is the antisubordination principle, which is the idea that discrimination based on group identity is impermissible.<sup>210</sup> Socially defined "stigmatizing inequalities," particularly those of caste, deny "the essential humanity of those who are stigmatized."<sup>211</sup> Government policies and practices that reinforce social inequality do not work to the good of the community; those distinctions that dismantle historical injustices promote our common humanity. But the distinctions themselves must be continually re-evaluated.<sup>212</sup>

## 2. Respecting Identity Differences

The principle of equal worth alone may be so abstract that it is meaningless. As Michel Rosenfeld has noted in another context, "all nine Justices seem to agree in *Croson* . . . that the equal protection clause is designed to uphold the equal worth, dignity, and respect of every individual regardless of race."<sup>213</sup> But, a theory that requires respect for the differences of humanity demands more than an empty agreement at a high plane of abstraction. A commitment to empathy, respectful tolerance, and care for others, rather than shared values, will not risk sacrificing pluralism on the altar of agreement.<sup>214</sup>

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<sup>210</sup> See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (describing the antisubordination principle as eliminating power disparities "through the development of laws and policies that directly redress . . . disparities"); Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 960 (1994) ("[T]he antisubordination principle contends that certain groups should not occupy socially, culturally, or materially subordinate positions in society. . . . [U]nder this conception of equality, government action would be held constitutionally acceptable only to the extent that it did not create, reinforce, or perpetuate those groups' subordinate status."); see also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (arguing that the subordination of women is based on their group identity).

<sup>211</sup> Kenneth L. Karst, *The Supreme Court 1976 Term: Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 59–60 (1977).

<sup>212</sup> See Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 98 (1994) ("Valuing the principle of antisubordination is more than a game of hierarchical rankings of 'who's most oppressed'; it means a serious commitment to evaluating and eradicating all forms of oppression.").

<sup>213</sup> Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1749 (1989).

<sup>214</sup> See Teresa Bruce, *The Empathy Principle*, 6 LAW & SEX. 109, 117 (1996); Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 452 (1991); McClain, *supra* note 31, at 29.

Shared humanity does not rest on comparisons of homosexuality to a heterosexual norm, nor does it deny important differences of identity features such as sexual orientation. The twin flaws of the formal equality model are its heterocentrist bias and its resulting dismissal of difference: if homosexuals differ from heterosexuals, those departures from the heterosexual norm undercut claims of rights.<sup>215</sup> Shared humanity theory begins from a different premise. It looks for common characteristics of individuals relative to the purposes of a law—In what ways are people seeking entrance in the military good soldiers? In what ways do people seeking to adopt make good parents?—but it also requires an open-minded inquiry into and acceptance of individual differences and a careful examination of the ways differences are turned into detriments.

Shared humanity says that because similarities among humans are so great, once the plaintiff shows differential treatment on the basis of group belonging, the burden is on the entity differentiating to justify the differences in treatment. Shared humanity is such a dominant fact that it is presumptively wrong to treat groups differently—particularly based on culturally constructed identity differences<sup>216</sup>—except in the relatively limited ways in which those differences matter. This, of course, has implications beyond gay legal theory: women need no urinals in restrooms, and whites do not need as much sickle cell testing, and sex segregated schools would be presumptively unconstitutional absent evidence that the differences in the ways boys and girls learn compels separate and differential treatment.<sup>217</sup>

A district court decision in the military service cases, *Able v. United States*,<sup>218</sup> which was later reversed on appeal, offers an illustration of the ways equal protection cases can reach more egalitarian outcomes when courts look first for shared features of humanity. In this challenge to the “don’t ask, don’t tell” policy, the ultimate appellate court decision deferred to Congress in matters of military assessment, and supported Congress’s determination that since gays were perceived as different, immoral, and possibly predatory, gays who were out of the closet could be excluded from service because they might upset the morale

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<sup>215</sup> See *supra* Part III.C.2.

<sup>216</sup> Distinguishing between constructed and “real” identity differences is a project that has absorbed jurists and theorists for decades. One of the recent lessons of both feminism and critical race theory is that many visible differences actually have little biological importance, but that culture defines and gives significance to differences of gender and race. See, e.g., Hayman, *supra* note 153, at 129; see also NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW* 2 (1998) (“gendered behaviors are carefully cultivated . . . [b]eginning with the first few moments and months of life . . .”).

<sup>217</sup> See Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 455–64 (1999).

<sup>218</sup> 968 F. Supp. 850 (E.D.N.Y. 1997).



of a military unit and destroy cohesion.<sup>219</sup> The district court's methodology was in sharp contrast to that of the appellate court.

The district court repeatedly stressed the idea that homosexual service members simply wanted to be soldiers. It was not just that homosexuals were no different than heterosexual service members, but that both groups had common dreams of being soldiers. "The plaintiffs are American citizens. They wish to serve their country in positions of responsibility and potential danger."<sup>220</sup> The district court in *Able* looked carefully for commonalities between homosexuals and heterosexuals, and then asked whether, given those measures of sameness, the differential government treatment could be justified. Both heterosexual and homosexual service members were, for the district court, first and foremost soldiers seeking to serve their country. Indeed, the "don't ask, don't tell" policy "does not disqualify someone from serving in the Armed Forces," it just "conditions that service on a homosexual's keeping that orientation a secret."<sup>221</sup>

The district court asked whether an "out" homosexual differed from an "out" heterosexual, questioning the assumption that secrecy reduces security risks:

It is hard to imagine why the mere holding of hands off base and in private is dangerous to the mission of the Armed Forces if done by a homosexual but not if done by a heterosexual. . . . The government does not justify its discrimination by reference to some defect in the performance of homosexuals, or claim that they represent a security risk as likely targets for blackmail . . . or that they are apt to seduce heterosexuals.<sup>222</sup>

The court noted that many sexual practices of homosexuals and heterosexuals were similar, the only difference residing in the sex of the "person's sexual partner."<sup>223</sup>

In searching for sameness, the court encouraged other courts to empathetically imagine "what it might be like to be a homosexual."<sup>224</sup> This was, perhaps, the most important part of the district court's opinion in *Able*. The court recognized the constructed nature of the differences.

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<sup>219</sup> See *Able v. United States*, 155 F.3d 628, 635–36 (2d Cir. 1998).

<sup>220</sup> *Able*, 968 F. Supp. at 861.

<sup>221</sup> *Id.* at 864.

<sup>222</sup> *Id.* at 857–58.

<sup>223</sup> *Id.* at 864. "Sodomy, defined by the Uniform Code of Military Justice as oral or anal sex, defines the class of homosexuals no more than it does the class of heterosexuals. Studies of sexual behavior indicate that a large number of heterosexuals engage in oral and/or anal sex." *Id.*

<sup>224</sup> *Id.* at 861.

For the United States government to require those self-identifying as homosexuals to hide their orientation and to pretend to be heterosexuals is to ask them to accept a judgment that their orientation is in itself disgraceful and they are unfit to serve. To impose such a degrading and deplorable condition for remaining in the Armed Services cannot in fairness be justified on the ground that the truth might arouse the prejudice of some of their fellow members.<sup>225</sup>

The challenge, of course, is to find ways to convince the general public and the judiciary that many differences are socially constructed and that society has attached disadvantages to the constructions of difference. For too long in cases concerning sexual minorities, the classification of sexual orientation, as defined by conduct—with the moral opprobrium attached to same-sex sexual relations—has been the definition of the difference. The difficulty is in how to develop respect for differences, while taking away the assigned disadvantages.

### 3. *Committing Value Conflicts to Reason and Empirical Inquiry*

How then will the hard decisions be made—particularly those that reconcile the group-orientation of the antisubordination principle with the search for shared features among the larger collective?<sup>226</sup>

The common good for a theory of shared humanity is not defined in communitarian terms of shared values<sup>227</sup> or in beliefs of deliberative democracy<sup>228</sup> because for too long shared values were majoritarian only and the deliberative process was and still is exclusive.<sup>229</sup> It is communitarian in the sense of valuing equality and believing in the possibility of community, but with a critical twist: shared humanity does not depend on extolling collective

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<sup>225</sup> *Id.*

<sup>226</sup> See Owen M. Fiss, *What Is Feminism?*, 26 ARIZ. ST. L.J. 413, 421 (1994) (“The antisubordination principle requires that the social significance and legality of a practice be measured in terms of the impact of the practice on the group as a whole.”).

<sup>227</sup> See, e.g., MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 338–49 (1996).

<sup>228</sup> See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 3–7 (1996); see also AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 346–61 (1996) (developing a dialogic theory that the good will emerge from open and robust deliberation).

<sup>229</sup> See, e.g., Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 83 (1998) (“We are going to disagree about shared values.”); Jane S. Schacter, *Poised at the Threshold: Sexual Orientation, Law, and the Law School Curriculum in the Nineties*, 92 MICH. L. REV. 1910, 1922 (1994) (“Left-inspired calls for shared communal values create a dilemma. While progressive communitarians frequently make such arguments in defense of gay rights, these claims recall—ominously, if unintentionally—the conservative defense of community values that so strongly characterized the *Hardwick* majority opinion.”).

preferences. It recognizes that the majority can be wrong.

Instead, determinations of "the good" in shared humanity theory require a rationalist approach. They should be based on the best available empirical evidence in the sciences, social sciences, and humanities. I and others have argued that reasoned inquiry, according to the criteria of the scientific method, and the collection of cumulative, comprehensive, and converging evidence from a variety of disciplines, is the most egalitarian epistemological method for deciding difficult questions of value.<sup>230</sup>

When we decide what criteria to use, shared humanity theory does not just assume that the traditionally accepted—i.e. heterosexual—norms are the standard. Instead, shared humanity asks the decisionmaker to discard all preconceptions and look to see what standards have been scientifically demonstrated to matter to the decision. If the issue is whether an individual should be permitted to adopt a child, a humanist theory using rationalist methodology would inquire into those qualities that make a good parent.<sup>231</sup> If the question is whether an individual should be permitted to marry, a theory of shared humanity would look not to the religious practices or policies for marriage, but the humanist values of cohesion and familial belonging.<sup>232</sup> Shared humanity is not a matter of looking for equivalences between straights and sexual minorities; it is a searching inquiry for the best features of humanity, when "best" is defined rationally, empirically, and humanistically. Within this framework, some identity-based differences may be relevant to promotion of the collective.

Consider as an example the gay parent custody and adoption cases. It is an example that indicates the ways in which empirical answers—guided by reason and the cumulative, comprehensive, and converging evidence from a variety of

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<sup>230</sup> See Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 *FORDHAM L. REV.* 263, 266–74 (1989) (elaborating the ways in which reason as scientific inquiry can provide an appropriate deliberative method for questions of morality and value differences and explaining that scientific knowledge is not majoritarian); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 *STAN. L. REV.* 45, 48 (1996) (maintaining that reason and empathy should be the touchstones for expansion of gay rights: "[T]he root of most opposition to gay rights . . . is not legal doctrine per se, but judges' failures to approach matters involving human sexuality by using available social science research, and their broader failure to empathize with those whose sexual identity and desires are not exclusively heterosexual."); Vargas, *supra* note 132, at 221–25 (identifying the problem of judicial epistemological privileging but suggesting that judges are able to engage in "reasoned elaboration").

<sup>231</sup> See *infra* text accompanying note 234.

<sup>232</sup> A variety of anthropologists have noted the centrality and importance across cultures of families. See, e.g., BRONISLAW MALINOWSKI, *A SCIENTIFIC THEORY OF CULTURE AND OTHER ESSAYS* 62 (1944); John U. Ogbu, *Origins of Human Competence: A Cultural-Ecological Perspective*, 52 *CHILD DEVEL.* 413, 414–15 (1981).

disciplines—will differ from moral majoritarian answers.

Many of the cases in which gay parents have been successful in retaining custody, visitation rights, or pursuing adoption under a formal equality model have depended on the parent minimizing or making irrelevant the fact of his or her homosexuality.<sup>233</sup> To obtain or preserve custody, gays and lesbians have been forced to emulate heterosexuals.

A humanist theory would not indulge in the heterosexual masquerade compelled by the formal equality model. Instead, it would encourage courts to look first to see whether any parent seeking custody, visitation, or a prospective parent seeking to adopt possesses those features that available social science evidence suggests are indicative of good parenting: stability, constancy, nurturing ability, and other child-rearing skills.<sup>234</sup> It would also necessitate tackling any negative constructions of difference, such as concerns about the psychosocial development of children raised by gay and lesbian parents.<sup>235</sup> The theory would then ask whether any features of a parent's lifestyle might positively promote the best interests of the child. This inquiry would permit, for instance, consideration of the extended kinship communities that characterize some gay and lesbian relationships.

According to anthropologist Kath Weston, one feature of some gay and lesbian relationships is the development of families of choice that are not necessarily centered on biological relatives, but include stable, enduring, affectionate, and interdependent relations with friends and ex-lovers, and strong ties to a larger supportive community.<sup>236</sup> Children are raised in a strong social

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<sup>233</sup> See, e.g., *Lundin v. Lundin*, 563 So. 2d 1273, 1276 (La. Ct. App. 1990); *Irish v. Irish*, 300 N.W.2d 739, 741 (Mich. Ct. App. 1981); *Woodruff v. Woodruff*, 260 S.E.2d 775, 777 (N.C. Ct. App. 1979); *Conkel v. Conkel*, 509 N.E.2d 983, 984 (Ohio Ct. App. 1987); *A. v. A.*, 514 P.2d 358, 360 (Or. Ct. App. 1973); *Stroman v. Williams*, 353 S.E.2d 704, 705–06 (S.C. Ct. App. 1987); *Roe v. Roe*, 324 S.E.2d 691, 692 (Va. 1985); see also Strasser, *supra* note 145, at 867–69 & n.217 (1997) (cataloguing cases and referring specifically to one Tennessee case in which the court questioned the nine-year-old daughter to see if the mother and her lesbian lover hugged each other, kissed each other, or said they love each other in the presence of the child).

<sup>234</sup> See, e.g., GEORGE W. HOLDEN, PARENTS AND THE DYNAMICS OF CHILD REARING 146 tbl.7.1 (1997) (parental encouragement of emotional expression relates to child competence); RONALD HUXLEY, LOVE & LIMITS: ACHIEVING A BALANCE IN PARENTING 129 (1998) (use of action and relationship discipline increases independence and provides emotional security and freedom for children).

<sup>235</sup> See Ball & Pea, *supra* note 145, at 291–99; Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. SOC. ISSUES 29, 29, 41 (1986) (demonstrating that studies show that children in the care of lesbian and gay parents develop normally).

<sup>236</sup> See KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 29 (1991) (“Lesbians and gay men . . . lay claim to a distinctive type of family characterized as families

network, and the division of labor in these relationships is egalitarian and not tied to traditional gender patterns. Even though families of affinity may be formed in response to social alienation or estrangement from genetic families, these families offer choice, supportive acceptance, and economic and decisional independence often not found in traditional family groupings. African American and Indian experiences add to the evidence that children raised in extended families or nongenetic communities have a rich sense of identity and security.<sup>237</sup>

Thus, an appropriate inquiry for a court in an adoption case would be whether this particular prospective adoptive parent was part of an extended kinship community that might provide a larger, stable, more caring extended family structure for the child. This is an argument for the preservation of cultural differences—those that contribute to other virtues, such as security, stability, and belonging—even if those differences have grown up in response to subordination. This provides an example of the way shared humanity theory can validate gay identity or various forms of familial relationships.

### *C. Dangers of Homogenizing Strategies*

Shared humanity theory builds on core human desires and virtues. It looks for the ways in which we—all of us including gays, lesbians, bisexuals, straights, transsexuals, women, men, racial and religious minorities and majorities—are alike while taking into account the effects of differences. In considering the effects of differences, humanist theory pays specific attention to the socially constructed nature of differences: what cultural and legal disadvantages are attached to differences, and what advantages flow from differences? The answer offered by shared humanity theory is, in part, an assimilationist one; it seems to ambiguate the meaning of heterosexuality and homosexuality. This Section considers the dangers of homogenizing strategies in general and of searching for

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we choose or create.”); see also HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* 25 (1996) (explaining that children need an intact and cohesive family which is dependable); SIMON LEVAY & ELISABETH NONAS, *CITY OF FRIENDS: A PORTRAIT OF THE GAY AND LESBIAN COMMUNITY IN AMERICA* 393 (1995) (describing the social bonds and solidarity in the gay and lesbian community).

<sup>237</sup> See ELMER P. MARTIN & JOANNE MITCHELL MARTIN, *THE BLACK EXTENDED FAMILY* 10 (1978); CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 90–94 (1975) (explaining that extended kinship networks in black communities give children stability); Joyce B. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 *YALE J.L. & FEMINISM* 29, 51–58 (1998); see also Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 *TEMP. L. REV.* 1649, 1658–67 (1995) (discussing the ways in which the extended family structure of black families is child-focused, offers shared parenting opportunities and develops deep connections between children and elders).

central defining traits of personhood in the context of the experiences of sexual outsiders.

There are multiple challenges with any strategy that searches for sameness: Can we seek assimilation while retaining distinctive experiential differences? How can the lens of sameness ever lead to the recognition and acceptance of differences? Does the sameness strategy necessarily minimize the relevance of gay identities? The answers to these questions depend in large part on what is meant by "sameness"—sameness in what ways, along what dimensions, for what purposes.

Sexual minorities in particular have reason to be apprehensive about assimilationist strategies. They are encouraged in some instances and coerced in others into "converting" their sexual orientation, passing, or otherwise remaining invisible.<sup>238</sup> Assimilationist theories have been criticized in the areas of race, gender, and sexual orientation, principally because homologizing models ignore distinctive cultural identities and valorize the choices of the dominant culture.<sup>239</sup> In its search for essential similarities, shared humanity theory seems to compel the diminishment of differences. Diane Helene Miller makes this claim in the context of Roberta Achtenberg's successful nomination to the post of assistant secretary for Housing and Urban Development. Miller argues that when Achtenberg's supporters maintained that her sexuality was irrelevant to her qualifications for the position, they diminished the political significance of her appointment and dismissed this aspect of her identity "because although it is a difference, it does not *make* a difference."<sup>240</sup>

Furthermore, if a focus on common ground does not repress differences, it seems to create a hierarchy in which sameness comes first and differences are perpetually relegated to second place. At worst, it risks the hazards of forced assimilation, at best, the nominal recognition of differences. A pure sameness strategy can backfire, become the basis for dismissing differences that do matter, or create an "indifference to difference."<sup>241</sup>

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<sup>238</sup> See Yoshino, *supra* note 33, at 500–04.

<sup>239</sup> See Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 839–45 (1993); Yoshino, *supra* note 33, at 501–03; see also WILLIAM M. NEWMAN, *AMERICAN PLURALISM: A STUDY OF MINORITY GROUPS AND SOCIAL THEORY* 59 (1973) (describing assimilation by immigrant groups, where "[t]he central tenet . . . was that new groups must conform to the cultural tradition of the majority or dominant group.").

<sup>240</sup> DIANE HELENE MILLER, *FREEDOM TO DIFFER: THE SHAPING OF THE GAY AND LESBIAN STRUGGLE FOR CIVIL RIGHTS* 48 (1998).

<sup>241</sup> Thompson-Schneider, *supra* note 89, at 24–26.

### D. *Realizing a Vision of Common Humanity*

These potential critiques misunderstand both the premises and the epistemology of shared humanity theory. The theory does not suggest the assimilation of lesbians, gays, bisexuals, or transsexuals into the dominant heterosexual culture. It encourages instead a new search for human similarities. A theory of common humanity also avoids the bipolar categories and thinking that have come to characterize identity jurisprudence and, in the gay legal theory area, the failure of existing categories to conceive of gender hybrids.<sup>242</sup>

As Robin West succinctly states, "What heterosexual and homosexual citizens are universally—what we naturally share, and what we have in common—swamps in importance and magnitude this difference of sexual preference, orientation, or tilt."<sup>243</sup> Shared humanity theory believes we can examine and build on this plane of common human needs, desires, impulses, activities, and abilities, without sacrificing distinctive differences of both groups and of individuals within those groups.<sup>244</sup>

#### 1. *The Recognition of Equal Worth and Dignity*

As an example of the ways in which a theory of shared humanity would operate in legal decisionmaking—and the ways it would depart from the formal equality model—consider the not so hypothetical circumstance of antigay protests. My home state of Kansas houses in its capital city, Topeka, a virulently antigay pastor named Fred Phelps. Phelps is a pastor of the Westboro Baptist church in Topeka. He is a disbarred lawyer. And he is a hatemonger who thinks that Pat Robertson and George Bush are "lukewarm cowards."<sup>245</sup> He pickets funerals of gays and lesbians with signs saying "AIDS CURES FAGS, NO TEARS FOR QUEERS, FAGS BURN IN HELL," and "FAGS DIE, GOD LAUGHS."<sup>246</sup>

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<sup>242</sup> See, e.g., RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* 233–34 (1996).

<sup>243</sup> West, *supra* note 92, at 1320.

<sup>244</sup> See Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43, 43–45 (1994) (warning against creating an image of the "essential lesbian").

<sup>245</sup> Westboro Baptist Church Web Site, *FAQ*, (last modified Apr. 24, 2000) <<http://www.godhatesfags.com/faq.html>>.

<sup>246</sup> See Westboro Baptist Church Web Site, *Photos/Images* (last modified Apr. 24, 2000) <<http://www.godhatesfags.com/photos/>>. Among the cars parked outside the family compound is one emblazoned with a vanity license plate spelling out "PRECTH8" ("preached hate"). *The Phelps Compound*, (visited Apr. 24, 2000) <<http://www.turnleft.com/phelps>>.

The Phelps' crusade is not as isolated as one might hope. See, e.g., *Christian Group*

The day before Matthew Shepard's funeral, which Phelps and some members of his church picketed, the City Council in Casper, Wyoming, adopted a fifty foot no protest or buffer zone for all funerals in the city. The city attorney said his office had to quickly research the law of abortion protests and buffer zones. "During that week," the attorney said, "we were living in a constitutional exam in law school."<sup>247</sup> Perhaps it is an occupational hazard, this uncontrollable impulse to grade constitutional law exams, but I thought "C+, maybe B-."

The City Council found parallels between the oppressed groups and saw buffer zones as a reasonable way of accommodating the choice interests of women seeking abortions and the privacy and dignity interests of funeral participants and the First Amendment interests of protestors. A theorist using traditional equal protection categories to evaluate differences between disempowered groups might question why the council picked the most limited buffer zone. Other cases in the abortion area have upheld buffer zones of 100 feet.<sup>248</sup>

But, let us consider in somewhat more depth the use of buffer zones in the case of funeral picketers. This is the point at which shared humanity theory offers a different way of thinking about the question—one not based initially on the identity of the plaintiff. Why not recognize that even a viewpoint—specific restriction in a traditional public forum is necessary to serve a compelling interest of avoiding desecration of a funeral when the only purpose of the speech

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*Distributes Anti-Homosexual Literature*, Wis. St. J., Apr. 5, 1996, at 1D (describing activities of Wisconsin Christians United passing out leaflets calling homosexuality "'a filthy scourge' and depict[ing] gay people as disease carriers and serial killers" and Oregon Citizens Alliance, "a radical religious right organization that wants to repeal all gay rights ordinances, and halt any further progress in the gays and lesbians rights movement for equal rights.").

<sup>247</sup> Laurie Asseo, *Shepard Funeral a Test for Casper*, DENVER POST, Nov. 20, 1998, at 38A.

<sup>248</sup> See, e.g., *Douglas v. Brownell*, 88 F.3d 1511, 1520–21 (8th Cir. 1996) (city could restrict residential picketing in front of a targeted residence and adjacent residences, with lots 75 feet in width, to protect neighborhood tranquility as long as picketing allowed on opposite side of street); *United States v. Lindgren*, 883 F. Supp. 1321, 1333–34 (D.N.D. 1995) (approving 100-foot buffer zone around clinic, clinic employees, and employees' homes). But see *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 357–58 (1997) (upholding fixed 15 foot buffer zones, striking floating 15 foot buffer zones); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 754–56 (1994) (upholding an injunction establishing a 36 foot buffer zone on a public street outside a facility providing abortion services, but striking a 300 foot buffer zone around residences of abortion clinic staff); *Lucero v. Trosch*, 121 F.3d 591, 606 (11th Cir. 1997) (striking down 200 foot residential no protest zone); *Kirkeby v. Furness*, 52 F.3d 772, 774–75 (8th Cir. 1995) (same); *United States v. Scott*, No. 3:95CV1216 (AHN), 1998 WL 386483, \*3–\*5 (D. Conn. June 25, 1998) (refusing to expand a fixed buffer zone around clinic from 28 to 56 feet).



is to inflict emotional injury. The Supreme Court held in *Frisby v. Schultz*,<sup>249</sup> “[t]here simply is no right to force speech into the home of an unwilling listener.”<sup>250</sup> As in *Frisby*, the funeral picketing threatens the psychological and physical well-being of the funeral-goers who are held “captive” by the circumstances of the funeral (it’s only going to happen once and only in one place). Why not prohibit funeral picketing within thirty minutes before and thirty minutes after a scheduled service?<sup>251</sup>

Shared humanity theory does not overlook distinctive features of identity, but focuses instead on situational differences: differences with respect to the purpose of the governmental regulation. Of course, there may be important differences between those seeking abortions and funeralgoers. Perhaps buffer zones for abortion protestors make some sense: they allow picketers to come within the hearing range of those seeking abortion services, to allow the picketers the possibility of changing minds (although some of us might want to better recognize the vulnerability of a frightened, pregnant sixteen-year-old girl forced to run a gauntlet of angry adults with bullhorns). But, does precisely the same buffer zone for a picketer at a funeral of a gay or lesbian make sense? The picketer is not going to convince the mourners not to care or convince the decedent not to be gay or lesbian.

A humanist theory would turn instead toward considerations of equal worth and dignity and respect for all persons. The picketer’s purposes are to preach hate, to desecrate the funeral, and to intrude on the private grief of family and friends mourning their loss. Even portrayed in the most favorable light, the protest’s purpose of sending a public message claiming that homosexuality is immoral is one that can be served in other places and at other times. Gay relationships, chosen families, and biological and legal families are entitled to equal worth and respect, particularly at their most vulnerable times of grief. Cushioning families against grief—providing in some circumstances compensation for it and creating elaborate rituals to assist survivors—is a human value that crosses time and cultures, and it is one worthy of respect.<sup>252</sup>

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<sup>249</sup> 487 U.S. 474, 485 (1988) (ordinance prohibiting focused picketing in front of a particular residence not unconstitutional); see also *Portland Feminist Women’s Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 686–87 (9th Cir. 1988) (upholding as content-neutral a reasonable time, place or manner restriction on speech an injunction against “shouting, screaming, chanting, or yelling” by anti-abortion protestors in a modified form). But see *Boos v. Barry*, 485 U.S. 312, 312–13 (1988) (compelling interest not narrowly tailored in protecting dignity of foreign officials and thus striking District of Columbia provision prohibiting signs critical of foreign governments within 500 feet of embassies).

<sup>250</sup> *Frisby*, 487 U.S. at 485.

<sup>251</sup> See, e.g., Ronald C. Griffin, *Equality: Nibbling Around the Edges*, 34 WASHBURN L.J. 460, 470 (1995) (urging prohibiting picketing 30 minutes before and after church services).

<sup>252</sup> See, e.g., MICHAEL C. KEARL, *ENDINGS: A SOCIOLOGY OF DEATH AND DYING* 95

Irrespective of identity categories, why in the name of the Constitution must we permit Fred Phelps to feast on the grief of others?

## 2. Identification, Empathy, and Acceptance of Differences

Many constitutional cases brought by sexual outsiders are equal protection challenges to invidious distinctions created by legislation. A critical feature of this humanist approach is that regarding a challenge to a particular legal distinction, we can emphasize *sameness regarding the purposes of that distinction* without accepting the idea of sameness overall. Shared humanity theory thus accepts the idea that what sets gays, lesbians, bisexuals, and transsexuals apart in a heterosexual culture *are* their experiential differences, but urges that the disadvantaging of those differences is the point at which sameness or difference analysis is most useful.

Critics might argue that it sacrifices an important part of gay or lesbian identity to stress what is the same about homosexuals and heterosexuals rather than what is different. Searching for shared features of humanity asks a slightly different question: What are the central, defining traits of humanity—relative to a particular law—keeping in mind the overarching principle of respecting the differences of identity. This does not risk assimilation as absorption. Shared humanity encourages assimilation plus visibility, not hiding sexual identity, but making visible what we are proud of in relation to a particular legal classification: What makes a good parent, a good soldier, a good union that the state should recognize.

This is one way that theorists can both present gay relationships as positive and make law reflect our lived experiences. Preserving status differences between homosexuals and heterosexuals requires the depiction of homosexuals as moral deviants. If gay legal theorists and litigators show homosexuals, bisexuals, and transsexuals as warm, well-adjusted, nurturing, loving people, this will begin to combat perverse cultural representations.<sup>253</sup>

Several legal theorists question the prospects for empathetic understanding

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(1989); IAN MORRIS, KEY THEMES IN ANCIENT HISTORY: DEATH-RITUAL AND SOCIAL STRUCTURE IN CLASSICAL ANTIQUITY 1-3 (1992) (using burial to examine social structure of cultures).

<sup>253</sup> See, e.g., In the Matter of Evan, 153 Misc.2d 884, 885 (N.Y. Fam. Ct. 1992) ("Diane F. and Valerie C., have lived together in a committed, long-term relationship, which they perceive as permanent, for the past 14 years. . . . Both home studies describe Diane as a warm, loving and nurturing woman who is committed to Evan and is an effective parent to him."); Butler, *supra* note 72, at 868 ("In the late 1980s approximately three million gays and lesbians were parents, and between eight and ten million children were being raised in gay or lesbian households.").

to solve the problems of outsider groups.<sup>254</sup> Richard Delgado and Jean Stefancic describe what they term the “empathic fallacy,” the misguided belief “that we can enlarge our sympathies through linguistic means alone.”<sup>255</sup> One limitation of empathy, according to Delgado and Stefancic, is that it operates best in a time warp—we are only able to escape the dominant narrative and received understandings through the distance of time. So we can understand that prejudice of a prior generation is wrong, but we are limited in the ability to objectively view our own contemporary prejudices.<sup>256</sup> They also make the point that speech is limited in its ability to cure prejudices because the standard stories are so deeply ingrained that they rebuff new narratives as “extreme, coercive, political and wrong.”<sup>257</sup> It is too easy, Delgado points out, to slip into “false empathy,” in which a majority group member “pretends to understand and sympathize” but actually “has a shallow identification with the other.”<sup>258</sup>

The solutions Delgado urges in the context of race are for whites to become race traitors and to work on subverting white consciousness from within the white race group.<sup>259</sup> These are strategies that can be adapted and used in the area of sexual orientation, if straights are willing to claim membership as sexual minorities, by, for example, describing attacks on gays and lesbians as attacks on “us.” These strategies for ambiguating the meaning of sexual identity deserve greater exploration. But while these are promising tactics for already committed liberals, the greater challenge is to develop strategies that will work for the great majority of conservative judges, jurors, and lay people. Although Delgado has carefully elaborated and thoughtfully cautioned about the hazards of false empathy, I am not as willing as he is to jettison the prospects of cultivating real

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<sup>254</sup> See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2125 (1989) (“The guideposts for assigning our priorities are missing in the empathy literature.”); Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929, 944 (1994) (arguing that projective empathy and diversity “do not mix well,” because individuals “can fully empathize only with others whose self-developing experiences are at least closely analogous to its own”). Theorists outside law have also questioned the “gap between empathy and acting on another’s behalf.” Megan Boler, *The Risks of Empathy: Interrogating Multiculturalism’s Gaze*, 11 CULTURAL STUD. 253, 255 (1997).

<sup>255</sup> Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261 (1992).

<sup>256</sup> *Id.* at 1277–79.

<sup>257</sup> *Id.* at 1279.

<sup>258</sup> Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 71–72 (1996).

<sup>259</sup> *Id.* at 95–100.

identification.<sup>260</sup>

Available social science evidence suggests that creating understanding about identity differences is a process that requires initial identification with other-group members.<sup>261</sup> It is easier to understand the situations of others or take their perspective when one perceives others as "having their own goals, interests, and affects"; in short, as Lynne Henderson explains, "the reality is that we are more likely to empathize with people similar to ourselves."<sup>262</sup> Delgado makes this point as well, saying that "[W]e find it easy to empathize with the victims of crime . . . particularly if they are middle-class people like us."<sup>263</sup> The challenge is how to cultivate true feelings of "people like us" so that majority group members—and not just the leftist, already sympathetic fringe—are willing to become race, gender, or sexual orientation traitors.

This identification can be a sense of shared humanity rather than any particular association with characteristics of other-group members. Studies of gentiles who rescued Jews during the Holocaust "found that they were motivated to act altruistically on behalf of others by their identification with a 'globalized' humanity."<sup>264</sup> From this initial identification comes the ability to perceive the differing experiences of another person.<sup>265</sup>

If the stepping stone to empathetic understanding lies in identification, the concern is where this leaves differences. Cynthia Ward makes this point in

<sup>260</sup> *Id.* at 95 ("persons of radically different background and race cannot be made vicariously to identify with us to any significant extent"). John A. Powell makes a similar point: "Delgado actually seems to be describing a semiconscious falseness masquerading as empathy. While Professor Delgado identifies a problem that should give us pause, it should not detract from the possibility of real empathy." John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. J. 97, 113 (1998).

<sup>261</sup> See, e.g., MICHAEL A. HOGG & DOMINIC ABRAMS, SOCIAL IDENTIFICATIONS 92–115 (1988); Kohn, *supra* note 201, at 118–19. Other research in social psychology suggests that almost everyone—including small children and even infants—possesses empathetic ability, but that adults vary in their capacity to exercise this trait. See Joan E. Grusec, *The Socialization of Altruism*, in PROSOCIAL BEHAVIOR 9–29 (Margaret S. Clark ed., 1991).

<sup>262</sup> Henderson, *supra* note 214, at 1581, 1584.

<sup>263</sup> Delgado, *supra* note 258, at 89.

<sup>264</sup> Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 ROGER WILLIAMS U. L. REV. 175, 202 (1998) (citing Kristen R. Monroe et al., *Altruism and the Theory of Rational Action: Rescuers of Jews in Nazi Europe*, 101 ETHICS 103 (1990)).

<sup>265</sup> See ARNOLD P. GOLDSTEIN & GERALD Y. MICHAELS, EMPATHY: DEVELOPMENT, TRAINING, AND CONSEQUENCES 4–5 (1985); see also Mark A. Barnett, *Empathy and Related Responses in Children*, in EMPATHY AND ITS DEVELOPMENT 146, 154–55 (Nancy Eisenberg & Janet Strayer, eds. 1987) (noting that encouraging perceptions of similarities to others by promoting "values that emphasize the connectedness among all people" can heighten empathetic abilities and lead to responsiveness to different others).

political theory, as she questions whether empathy can be the “theoretical glue” to reconcile liberalism and communitarianism.<sup>266</sup> Empathy, says Ward, cannot serve at once the interests of equality and diversity. She distinguishes between “projective empathy” that acknowledges the “essential humanity” of other people, thus acknowledging their equality, and “imaginative empathy” that envisions others as autonomous and separate, thus recognizing their diversity.<sup>267</sup> But Ward’s concerns center on using the psychological concept of empathy to mediate conflicting goals of liberalism and communitarianism in political theory.<sup>268</sup> She never disputes that the actual operation of empathy as a psychological concept is a process in which one develops understanding of a different other through interest identification,<sup>269</sup> and then moves from making conscious identifications to elaborating about the distinctive personal history and position of the other, thus recognizing the other’s differences.<sup>270</sup> Thus the process of empathizing entails both “recognition of oneself in another” and perceiving the distinct other.<sup>271</sup>

In practice, then, how can an attorney cultivate an empathetic response for her client who is a flamboyant drag queen or a butch dyke? What happens when you want a judge to put himself into the shoes of a transvestite? What about queers who “practice promiscuity as sexual revolution” and may not be in a committed or stable partnership, but who wish to adopt a child?<sup>272</sup> The decision that might need to be committed to an interpretation of available social science evidence is whether promiscuity and child-rearing have any relation. Does promiscuity (and by what definition—a different partner each night or month or year?) when practiced by individuals of any sexual orientation, conflict with good parenting?

Shared humanity theory runs the risk that it will be perceived as a public relations campaign—“Let’s send the effeminate queens back to the closet so that people who look like suburban America will lead the movement for equal rights. That’s the way to fool America into believing we’re just like them.”—and the

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<sup>266</sup> Ward, *supra* note 254, at 931.

<sup>267</sup> *Id.* at 949.

<sup>268</sup> See *id.* at 934–35 n.19 (“These definitions may not, of course, reflect the way the concept of empathy is used in other fields, such as psychology. In this essay I . . . argue that . . . the attempted transfer of empathy from a psychological to a political concept creates intractable problems.”).

<sup>269</sup> See R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* 124–28 (1981).

<sup>270</sup> See Tony Komer, *Making Conscious Identifications: A Means of Promoting Empathic Contact*, 27 AUST. & N.Z. J. PSYCHIATRY 115, 117 (1993).

<sup>271</sup> *Id.*

<sup>272</sup> Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay “Victories,”* 4 LAW & SEX. 83, 112 (1994).

parallel risk that to the extent that it is effective, it will favor only the most mainstream of sexual others.

It is undeniable that a strategy of sameness may well work best with mainstream sexual minorities. If people tend to empathize best with others who they perceive are like them, the least-threatening examples may move people past the barriers of fear and ignorance. But shared humanity theory encourages the search for human unity in ways that transcend the differences of sexual identity, race, class, or gender.

Perhaps one way to search for commonalities while focusing on differences—to keep humanist strategies from slipping into mainstreaming—is to concentrate greater attention on gender hybrids or the transgendered, who, as Jean Love says, “are about as far ‘outside’ the law as you can get in the United States today.”<sup>273</sup> In this respect, transsexuals seem to be where gays and lesbians were a quarter of a century ago: still classed as deviant in the social sciences and suffering from “gender identity disorder.”<sup>274</sup> The transgendered are only beginning to incorporate their history and stories into the social fabric.<sup>275</sup> Relatively little legal scholarship focuses on the experiences of gender hybrids.<sup>276</sup> If middle America can see the ways in which transsexuals are “people like us,” this seemingly conformist strategy takes on a subversive twist.

As theorists, we need to begin more actively incorporating the works of the transgendered into legal theory and their narratives in our consciousness. Consider, for instance, the books and speeches of Leslie Feinberg. Feinberg self-describes as a “masculine, lesbian, female-to-male cross-dresser and transgenderist,” and says s/he often feels “pronoun-challenged.”<sup>277</sup> In *Trans Liberation: Beyond Pink or Blue*, Feinberg describes the difficulties of difference, but focuses on shared experiences that transcend differences of

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<sup>273</sup> Jean C. Love, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE & JUST. 87, 96 (1998).

<sup>274</sup> AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 537–38 (4th ed. rev. 1994).

<sup>275</sup> See, e.g., PAT CALIFIA, *SEX CHANGES: THE POLITICS OF TRANSGENDERISM* (1997); MARJORIE GARBNER, *VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* (1995); *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* (Gilbert Herdt ed., 1994); ANDREW VACCHS, *CHOICE OF EVIL* (1999); Dierdre McCloskey, *Happy Endings: Law, Gender, and the University*, 2 J. GENDER RACE & JUST. 77 (1998).

<sup>276</sup> See, e.g., Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321, 1342–51 (1998) (relating various stories of female to male transsexuals); Colker, *supra* note 210; Drobac, *supra* note 108; Rachel Haynes, *Bisexual Jurisprudence: A Tripolar Approach to Law and Society*, 5 MICH. J. GENDER & L. 229 (1999); Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835 (1995).

<sup>277</sup> LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE* 19 (1998).

identity, such as the difficulties that we face when trying to make our lives conform to the boxes on official forms:

[Many] of us . . . sit in front of an application trying to figure out which of two boxes to check off—"F" or "M"—neither of which exactly fits our lives and our self-identities. You could write down "not applicable" or "none of the above" or "all of the above" next to those two little boxes, but it won't get you a job. It won't get you a driver's license. It won't get you a passport.<sup>278</sup>

These sorts of evocative passages begin to change the means we use to shape law. Perhaps shared humanity offers something more and different than mainstream identification: it shifts the focus to look past differences of dress, speech, manner, and sexual choices toward similarities of human belonging.

This focus on lived experiences, our "realities" rather than rhetorical tactics, as Evan Wolfson puts it,<sup>279</sup> may be a way to move academics and litigators toward a joint goal in re-presenting the lives of sexual outsiders. Wolfson makes the point that liberationist academics are too willing to dismiss strategies they characterize as "assimilationist" without considering the pragmatic realities of the arguments that work with legislators and judges. "One of our jobs in persuasion," Wolfson says, "is to go where the audience is, find them, and bring them along to where we want them to be."<sup>280</sup>

## V. CONCLUSION: GAY LEGAL THEORY AND CULTURAL CHANGE

Envisioning our shared humanity is a broader proposition, really, than simply arguing for equal treatment of lesbians, gays, and the transgendered through an assimilationist strategy that has as an integral part a respect for differences. The broader project is about prizing human relationships, realizing a vision of a common humanity, and developing a sense of responsibility for the human collective.

A theory of jurisprudence that requires compassion for fellow humans will call for changing fundamental principles in many areas of law other than constitutional law and sex discrimination. A humanist theory that commands an ethic of collective responsibility would prescribe, for example, abolition of the no duty to rescue rule in tort law. We need to require of strangers what Anglo-American law has "persistently refused to impose . . . the moral obligation of

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<sup>278</sup> *Id.* at 68.

<sup>279</sup> Wolfson, *supra* note 79, at 592–97, 599–603, 608–10.

<sup>280</sup> Interview with Evan Wolfson, Marriage Project Director, Lambda Legal Defense & Education Fund (July 26, 1999).

common humanity to go to the aid of another human being who is in danger.”<sup>281</sup> The recognition of personhood requires a particular attitude toward others that does not end with a vision of common humanity in a single country or continent. Obligations to the human race are more global still.<sup>282</sup>

Mainstreaming or “insider” strategies—tactics that depict gays and lesbians as similar to rather than different from heterosexuals—have been behind some of the most significant political successes of the gay rights movement.<sup>283</sup> Activists worked within existing structures to gain social and legal recognition, stressing the shared needs of families to urge corporations, for example, to provide partnership benefits.<sup>284</sup> These strategies of sameness seemed a sensible means of garnering cultural legitimacy, but they came with a price. They left heterosexual norms unexplored, overlooked sexual minorities who did not resemble heterosexuals, and omitted any discussions of subtle gender and sexual stereotyping.<sup>285</sup>

Shared humanity theory attempts to move beyond comparisons to a heterosexual norm by focusing on human commonalities. It would emphasize fundamental human traits and values that are worth promoting—love, caring, relationships between humans, respect for persons. This is not a strategy that encourages assimilation to conform to traditional structures defined by a heterosexual culture. It is a project that encourages recognition of our common humanity, but also demands continual questioning of constructions of sameness

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<sup>281</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 375 (5th ed. 1984).

<sup>282</sup> This proposition is demonstrated in numerous human rights instruments. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52–53, U.N. Doc. A/6316 (1966); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 49, at 71, U.N. Doc. E/800 (1948).

<sup>283</sup> This has been the strategy behind campaigns to secure protective state and local ordinances. *See, e.g.*, Peter M. Cicchino et al., *Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 567 (1991) (maintaining that the successful passage of the Massachusetts Gay Civil Rights Bill was due to the nonthreatening depiction of gays and lesbians as “apart from their sexual orientation, not much different from the general population”); *see also supra* text at notes 259–60. It was the basis of the student group first amendment cases, *see supra* text at notes 175–76, the approach used in *Baehr v. Lewin*, 852 P.2d 44, at 65–68 (Haw. 1993), and the mechanism behind municipalities and corporations providing domestic partner benefits. *See* Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 989 (1998).

<sup>284</sup> VAID, *supra* note 32, at 10 (“Some of the biggest successes of the gay rights movement came in the 1990’s through changes in corporate policies that covered thousands of employees.”).

<sup>285</sup> *See supra* text accompanying notes 90–122.



and difference and constant inquiry into the qualities and characteristics we want to promote. This is part of the transformative project: it encourages the re-envisioning of and a departure from the traditional and categorical defining traits in both theory and doctrine.

Gay legal theorists have been somewhat skeptical of universalizing strategies, fearing that any approach that developed "a basic concept of human commonality across sexual differences"—while vital—would be limited in its recognition of experiential differences.<sup>286</sup> Modern evidence from social psychology, though, suggests that true (not false, shallow, or super-ordinating) empathic understanding of differences begins in identification, the process of recognizing similarities.<sup>287</sup>

Humanization, though, does not require homogenization. Efforts toward humanization must include changing the cultural re-presentations of sexual minorities. This necessitates increasing visibility, combating untrue media representations, and replacing the dominant cultural images with more accurate portrayals of the lived experiences of lesbians, gays, bisexuals, and transsexuals.<sup>288</sup> Humanizing strategies must include exposing the framework of intolerance. This entails disputing the myth that tolerance is increasing,<sup>289</sup> unraveling rhetorical devices, such as the "special rights" metaphor, that divert attention from human conditions,<sup>290</sup> and exploring what is meant by "tolerance."<sup>291</sup> This means confronting acts of seeming tolerance, such as the deceptively sympathetic campaign for "curative therapy" to change the sexual orientation of nonheterosexuals.<sup>292</sup> It also means deconstructing tolerance itself, rather than accepting the idea that mere tolerance—nose-holding, bone-tossing

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<sup>286</sup> Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 722 (1997).

<sup>287</sup> See *supra* text accompanying notes 256–58.

<sup>288</sup> See Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969–1991*, 72 NEB. L. REV. 723, 725–29 (1993) (arguing that the conversation about gay rights began with visibility); VAID, *supra* note 32, at 196 (noting that the media "reproduce values, which confer and define meaning, and which shape human imagination").

<sup>289</sup> See *supra* text accompanying notes 17–47.

<sup>290</sup> See, e.g., Marcossan, *supra* note 85.

<sup>291</sup> See McClain, *supra* note 31.

<sup>292</sup> GLAAD Director Joan M. Garry explains that the ex-gay conversion campaign is not about tolerance: "their message isn't really about 'hope' or 'healing' or 'understanding,' but rather, about intolerance, deception and moral bankruptcy. This new campaign represents what has become a relentless, well-financed and reprehensible assault on the lesbian, gay, bisexual and transgender community."

tolerance or tolerance "lite"—is acceptable.<sup>293</sup>

Humanization may be most effective at the grass roots political level with nonlitigative strategies.<sup>294</sup> Small, local campaigns, such as urging city councils to pass antidiscrimination ordinances may be more promising in creating a vision of shared humanity. The Louisville, Kentucky experience illustrates the point. After close to a decade of effort, the Louisville Board of Aldermen passed the "Fairness Ordinance" in January of 1999, which added sexual orientation to the list of bases upon which employers cannot discriminate.<sup>295</sup> Conversations with the "Fairness Alliance" group that sponsored the ordinance indicate they won it through old-fashioned, grass-roots politics. They elected an alderman here, turned out a hostile one there, and gradually transformed the Board. Then they humanized the issue when there was a high-profile case of a lesbian fired from her job, and the tide was turned.<sup>296</sup> Lexington, Kentucky followed Louisville's lead, and other counties are looking at the Louisville and Lexington example.<sup>297</sup> Across the nation, more than one hundred cities and counties have passed antidiscrimination ordinances.<sup>298</sup> Of course, this sort of reform is both piecemeal and partial, as the Louisville experience demonstrates: the Louisville ordinance protects gays and lesbians from discrimination in employment, but does not prohibit discrimination in housing or public accommodations. But perhaps in developing broad jurisprudential theories, we have paid too little attention to the transformative power of nonjudicial efforts.

The common theme of all of these suggested efforts is to humanize sexual minorities. One of the worst effects, both legally and culturally, of laws that reflect intolerance or of the absence of laws that prohibit intolerance is the objectification of people. Dismantling prejudice is a complex process that requires social action, publicity, and changes in legal rules; the rule changes become internalized and help develop public conscience.<sup>299</sup>

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<sup>293</sup> See MICHAEL WALZER, ON TOLERATION xi-xii (1997) ("Toleration itself is often underestimated, as if it is the least we can do for our fellows, the most minimal of their entitlements. In fact, tolerance (the attitude) takes many different forms, and toleration (the practice) can be arranged in different ways.... Toleration makes difference possible; difference makes toleration necessary.").

<sup>294</sup> See, e.g., Wolfson, *supra* note 79.

<sup>295</sup> Sheldon S. Shafer, *Gay Rights Law Open to Interpretation*, COURIER-J. (Louisville Ky.), Jan. 28, 1999, at 01B.

<sup>296</sup> Interview with Sam Marcossion (June 24, 1999).

<sup>297</sup> Tom Taylor, *Debate on Gay Rights Law Expected in Henderson*, EVANSVILLE COURIER, July 12, 1999, at B1.

<sup>298</sup> See Jay Croft & Holly Crenshaw, *Gay Pride in Atlanta Not an End to Struggle*, ATLANTA J. & CONST., June 27, 1999, at H1.

<sup>299</sup> Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*,

Lawmaking may be most effective in altering the obligations of government or creating new theories of recovery for victims of inequality, somewhat effective in expressing a standard of morality, and perhaps effective only in the larger sweep of time in changing the private behavior of individual citizens.<sup>300</sup> While there are always interpenetrations between law and culture, law seems most effective in "culture-shifting" when the culture can be persuaded of the legitimacy of the change.<sup>301</sup>

As the experiences of women and racial minorities demonstrate, the challenge is to create a culture sympathetic to the constructed nature of differences. The history of favorable equal protection cases attests that when courts are convinced of essential similarities, it is easier for them to see the constructed nature of differences and the disadvantaging that is attached to differences. The Court in *Brown v. Board of Education*<sup>302</sup> saw school children being treated differently; the Court in *Mississippi University for Women v. Hogan*<sup>303</sup> saw nurses, the court in *Able v. United States*<sup>304</sup> saw soldiers, and the Court in *Romer v. Evans*,<sup>305</sup> voters.

In short, a broader social consensus in favor of nondiscrimination seems to develop most readily when it can be established that there is hostile or invidious antagonism because of a status we all share. Critical theorists are only beginning to look for these "interconnectivities"—these common structural, economic, and ideological factors that systematically disadvantage women, racial minorities and

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85 NW. U. L. REV. 343, 374 (1991) ("The main inhibitor of prejudice is the certainty that it will be remarked and punished.").

<sup>300</sup> See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 972–74 (1997) (discussing that lawmaking has five goals: (1) to create new rights and remedies for victims; (2) to alter the conduct of the government; (3) to alter the conduct of citizens and private entities; (4) to express a moral ideal or standard; and (5) to change cultural attitudes and patterns).

<sup>301</sup> *Id.* at 978.

<sup>302</sup> 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

<sup>303</sup> 458 U.S. 718, 733 (1982) (concluding that "the state's policy of excluding males from MUW's School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment").

<sup>304</sup> 968 F. Supp. 850, 865 (E.D.N.Y. 1997) (holding that the National Defense Authorization Act's "imposition of unequal conditions on homosexuals . . . in the armed forces is invalid under the Equal Protection component of the Fifth Amendment to the Constitution"); see also *supra* text at notes 218–25.

<sup>305</sup> 517 U.S. 620, 635 (1996) (holding that Colorado's Amendment Two, which precludes legislation designed to protect people based on their sexual orientation, violates the Equal Protection Clause); see also *supra* text accompanying notes 157–58.

sexual others.<sup>306</sup> Moving from the theorizing about oppression—when we know that phenomenologies of discrimination may vary widely—to theorizing about belonging may be the next important step. We need to develop assimilationist strategies in which sexual identity can still be a major aspect of a person's life rather than an inconsequential difference.

Law is supposed to be a reflection of our aspirations. Law is reconstructive. Why can't we use law to reconstruct us as a more tolerant, loving people?

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<sup>306</sup> See, e.g., Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995).